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Foundations to American Nationalism as Viewed Through John Marshall's Early Life and Three of His Decisions in Constituional Law

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FOUNDATIONS TO AMERICAN NATIONALISM AS VIEWED
THROUGH JOHN MARSHALL'S EARLY LIFE AND
THREE OF HIS DECISIONS IN
CONSTITUTIONAL LAW

by

EARL MCKINLEY LEWIS

A Thesis Submitted in Partial Fulfillment of
the Requirements for the Degree of Master
of Arts in Loyola University

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CHAPTER I

THE LIFE OF JOHN MARSHALL TO 1801

John Marshall, who consolidated the union from the bench of the Supreme Court of the United States; Thomas Jefferson, who sought to enthrone the states above the union; and Robert E. Lee, who led the military forces of the secessionists were, according to William A. Maury, descendants from Colonel William Randolph of Turkey Island, Virginia.¹ Colonel Randolph is reported to be the first of the Randolph name to settle in Virginia, where he became the progenitor of, "...a widespread and numerous race, embracing the most wealthy families and many of the most distinguished names in Virginia history."² John E. Oster credits the Honorable William A. Maury, former Assistant Attorney-General of the United States, with the following diagram which shows John Marshall's mother, Mary Keith; Thomas Jefferson's mother, Jane Randolph; and Robert E. Lee's grandmother, Mary Bland; to be granddaughters of Colonel William Randolph:

Col. William Randolph of Yorkshire, England, and
"Turkey Island", Virginia, married Mary, daughter
of Henry and Catherine Isham, of Bermuda Hundred,
Virginia.

Thomas, 2d son m. M. Fleming	Isham, 3d son m. Jane Randolph	Elizabeth, 9th child m. R. Bland
Mary, 3d child m. Wm. Keith	Jane Randolph 4th child m. Peter Jefferson	Mary Bland m. Henry Lee

1 John Edward Oster, The Political and Economic Doctrines of John Marshall, The Neale Publishing Co., New York, 1914, 16.

2 Ibid.

Mary Randolph m.	Thomas Jefferson	Henry Lee
Col. Thomas		m. Lucy
Marshall		Grimes

John Marshall

Henry Lee
m. Anne Hill
Carter

Robert E. Lee³

The roots of the Marshall family stem from England, although the family came to America from Wales about 1730.⁴ There does not seem to be much known of Chief Justice Marshall's grandfather, John Marshall, who was the father of four boys, the most distinguished of whom was Thomas Marshall. For Thomas Marshall, a man of no mean intellectual and moral strength, no apologies need be made for his patriotism or for the notable services he rendered his country as a soldier, legislator and as a private citizen. He was born in Westmoreland County at a site on Appomattox Creek on April 2, 1730,⁵ which was the birth year of his school mate, neighbor and friend, the immortal George Washington.⁶ Both men were land surveyors who profited from their friendship and contact with each other and with Lord Fairfax, an Englishman of noble descent, who inherited extensive land holdings in the savage western frontier section of Virginia. Lord Fairfax was attracted to Washington, whom he employed as a land surveyor and on whom he exerted great influence, along with Thomas Marshall, through his examples of gentleness, fine tastes, dignity and

3 Ibid., 17

4 Henry Flanders, The Life of John Marshall, T. and J.W. Johnson and Co., Philadelphia, 1904, 1.

5 Albert Jeremiah Beveridge, Life of John Marshall, Houghton-Mifflin Co., New York, 1916, I, 13.

6 Flanders, 1.

speech.⁷ Lord Fairfax is credited with the ownership of several of the precious volumes of standard writings which Thomas Marshall made use of in his frontier cabin in the wilds of Fauquier County.⁸

Within eleven weeks after General Braddock's defeat, and while the news of the humiliating beating given the King's troops under the brave Englishman was humming around the colonial firesides, striking sparks of self-reliance in the hearts of many Americans, John Marshall was born.⁹ It was in a log cabin in Prince Henry County on the western fringes of the wild Virginia frontier that Mary Marshall gave birth to John Marshall on September 24, 1755.¹⁰ The natural setting of his birth was most suited to the development of the uncommon qualities of mind and body which he used so selflessly as a sculptor and forger of American nationalism. It was fortunate in many regards that he spent the first twelve years of his life at the scene of his birth.

John Marshall's early childhood was spent helping his mother carry on the duties of the household. At an early age he was acquainted with the use of the rifle. It was his constant companion as he roved through the foothills of the Blue Ridge Mountains, a section of Virginia no less famous for its illustrious sons than for the indescribable beauty of its quiet valleys and modest hills. The strenuous outdoor life of the frontier contributed much to his health. The wondrous manifestations of God in

7 Beveridge, I, 50.

8 Ibid., 46.

9 Ben W. Palmer, Marshall and Taney, The University of Minnesota Press, Minneapolis, 1939, 57.

10 John Marshall, John S. Adams, Editor, Autobiography, The University of Michigan Press, Ann Arbor, 1937, 3.

nature about him cultivated the qualities of gentleness and simple dignity in the life of this boy, who was destined to exercise such a lasting influence on his country's national life.¹¹

Marshall's parents, and particularly his father, deserve much credit for his education. His formal schooling was meager indeed; but his father, who intended him for the bar from the first, set about educating him in the Marshall home. Of this early design for his future career at the American bar, Marshall said in later years:

I was educated at home under the direction of my father....From my infancy I was intended for the bar; but the contest between the mother country and her colonies drew me from my studies, and my father from the superintendence of them.¹²

At the early age of twelve, Marshall had transcribed Pope's "Essay on Man."¹³ The work of this precise English writer had no small influence on Marshall's orderly and clear functioning mind. During the early period of his life, he was exposed to other works which his father had brought into the Marshall home through the kindness of wealthy Lord Fairfax.

At some indefinite time, about 1765, Thomas Marshall moved his family to a better site in the foothills of the Blue Ridge Mountains, in a valley called "The Hollow."¹⁴ "It was here that John Marshall received his first schooling at the age of fourteen. He studied Latin one hundred miles away in Westmoreland County under the tutelage of a respectable clergyman, the

11 George Van Santvoord, Lives and Judicial Services of Chief Justices, Charles Scribner, New York, 1854, 299.

12 Oster, 197.

13 Marshall, Autobiography, 4.

14 Beveridge, I, 5.

Rev. Mr. Campbell."¹⁵ After studying one year under the distinguished teacher, with James Monroe as a schoolmate, Marshall returned home and spent another year under the instruction of Mr. Thompson, a Scotch clergyman of strong anti-British feelings, who spent approximately one year in the Marshall home. These two periods along with several weeks at William and Mary College mark the only formal education Marshall ever received.¹⁶

Returning to "The Hollow" after the time spent under the Rev. Mr. Campbell, Marshall continued his education under the close supervision of his father. "He became enamored of the classical writers of the old English school of Milton and Shakespeare and Dryden, and Pope; and was instructed by their solid sense and beautiful imagery."¹⁷ The relationship between Marshall and his father was as beautiful and beneficial as it was uncommon and commendable. In his brief and modest autobiographical sketch of his life, Marshall wrote that: "My father superintended the English part of my education, and to his care I am indebted for anything valuable which I may have acquired in my youth. He was my only intelligent companion; and was both a watchful parent and an affectionate friend."¹⁸ It was about young Marshall's sixteenth year that his father acquired a copy of Blackstone's Commentaries which Marshall read eagerly.

Of no small influence on Marshall's development were the reports in

15 Flanders, 6.

16 Marshall, Autobiography, 4-6.

17 John F. Dillon, John Marshall, Callaghan and Co., Chicago, 1903, III, 331.

18 Marshall, Autobiography, 4.

the Marshall home of the proceedings in the Virginia legislature. Thomas Marshall was privileged to sit in the Virginia House of Burgesses with such towering figures in American history as George Washington and Patrick Henry.¹⁹ On many of the issues facing the legislature during this period, 1761-1770, there developed the inevitable cleavages between the tidewater interests with their pro-British leanings and these rugged, liberty loving uplanders. At such points George Washington, Thomas Marshall, Patrick Henry and the other frontiersmen stood as one man.²⁰ There can be no doubt that Thomas Marshall's reports of these heated legislative deliberations to his son were sources of great inspiration and interest. The personality, character, conviction and genius of Washington, the nationalist, and Henry, the crusader for human liberty, were thus brought into the Marshall home where they immeasurably influenced the life and thoughts of young Marshall. This does not mean that the Marshall home was barren of talent and high precept for young Marshall's edification. So highly did Marshall, the Chief Justice, regard the ability and character of his father that he was able to say, "My father...was a far abler man than any of his sons. To him I owe the foundation of all my own success in life."²¹ Certainly, young Marshall must have thrilled and warmed with excitement as he listened to his father's firsthand account of Patrick Henry's fiery and eloquent discourses on such measures as the Stamp Act Resolutions and the Robinson Bill. The Robinson Bill represents the first

19 Beveridge, I, 59-60.

20 Ibid., I, 61.

21 Santvoord, 298.

successful disruption of tidewater dominance of the Virginia Legislature by the carelessly dressed backwoodsmen.²² It is well to note that at an early stage in John Marshall's life, the influence of men with a strong sense of provincialism were being felt.

In Marshall's eighteenth year the family moved to a site which was a short distance from their house in "The Hollow". Here Thomas Marshall built an impressive frame house which was called "Oak Hill." It was from this house that Thomas Marshall and his eldest son, John, went forth to fight and suffer in the struggle for American independence. The father had prepared himself and his son for the day when their country's call would take them from their fireside in the peaceful Virginia hills to the strife and pain of the battlefield. In beginning an abbreviated account of Marshall's military experience, it may well be stated here that the six years of military life, begun in 1775, contributed in great measure to Marshall's deeply-rooted principles of nationalism of which he was, perhaps, America's leading exponent.

I am disposed to ascribe my devotion to the union, and to a government competent to its preservation, at least as much to casual circumstance as to judgement. I had grown up at a time when a love of union and resistance to the claims of Great Britain were the inseparable inmates of the same bosom; when patriotism and a strong fellow-feeling with our suffering fellow citizens of Boston were identical; when the maxim 'united we stand and divided we fall' was the maxim of every orthodox American; and I had imbibed those sentiments so thoroughly that they constituted a part of my being. I carried them with me into the army where I found myself

22 Beveridge, I, 63.

associated with brave men from different states who were risking life and everything valuable in a common cause believed by all to be most precious; and where I was confirmed in the habit of considering America as my country and Congress as my government. I partook largely of the sufferings and feelings of the army, and brought with me into civil life an ardent devotion to its interests.²³

This devotion to the interests of the army following the Revolution meant that Marshall was committed to strengthening of the central government to such an extent that it would be capable of suppressing the particularist tendencies of the states in matters of common concern, as a prerequisite to caring for the army and other agencies of the general government. An examination of the military phase of Marshall's varied career of public service casts some light on the crystallization of his political concepts and convictions.

It was an afternoon in May, 1775, that John Marshall, then a boy of nineteen years, appeared as a young soldier on a muster field before a militia company to instruct them in the manual of arms. He had been given the rank of lieutenant, and was there to impart some of the training his father had given him by way of preparing the young frontiersman to serve in the defense of their country in case of British attack. The following description has come from a kinsman of Marshall who was in this company of young Americans.

He was about six feet high, straight and rather slender, of dark complexion...the outline of a face nearly a circle, and within that,

23 Marshall, Autobiography, 9-10.

eyes dark near to blackness, strong and penetrating, beaming with intelligence and good nature....The body and the limbs indicated agility, rather than strength, in which, however, he was by no means deficient. He wore a purple or pale blue hunting shirt, and trousers of the same material, fringed with white...a round black hat mounted with the buck's tail for a cockade crowned the figure and the man. After a few lessons the company were dismissed....He then challenged an acquaintance to a game of quoits and they closed the day with foot-races and other athletic exercises, at which there was no betting. He had walked ten miles to the musterfield, and returned the same distance on foot to his father's house at Oak Hill where he arrived a little after sunset.²⁴

Marshall gave evidence of oratorical inclination at this time when, at the end of the drill period, he addressed his company on the nobility and justice of their cause. His sense of humor and his athletic bent were displayed by the jokes he made and the races he ran with the men. In the fall of 1775 Marshall was assigned with some of his original company to the Minute Battalion of the Eleventh Virginia Regiment of the Continental line. As a member of this organization he participated in his first battle. This was the battle of the Great Bridge, December, 1775, which the Americans won and in which Marshall's father is reported to have fought with uncommon valor and distinction.²⁵ It is notable that in the first battle of the great struggle for American freedom fought on Virginia's soil, John Marshall fought and fought well.

In July, 1776, Marshall marched away as a lieutenant in the Eleventh

²⁴ Dillon, III, 287-288.

²⁵ Beveridge, I, 77-79.

Virginia Regiment. Commissioned a captain in May, 1777, he served faithfully until February, 1781.²⁶ History credits him with participation in several of the important battles of the Revolution. Hitchcock wrote that:

He was engaged in the battles of Great Bridge, Iron Hill, Brandywine, Germantown, and Monmouth, serving also under Major Lee at Powles Hook and under 'Mad Anthony Wayne' in his daring and successful assault at Stony Point.²⁷

Having been tried and found not wanting in the crucible of battle, Marshall went with his illustrious Commander, George Washington, into winter quarters at Valley Forge, the historic altar of American suffering in cold, hunger, blood and miserable privation. Here Marshall, as could the others, including the stern and gallant Commander, ponder the cause and the cost of the struggle. Here at Valley Forge, John Marshall suffered with the unpaid, underfed and barely clothed men, who stood with Washington between the liberty of the American Colonies and British tyranny. Of his conduct at Valley Forge, Henry Howe gives the following appraisal which was supplied by one Captain Phillip Slaughter, Marshall's messmate during that memorable winter:

...nothing discouraged, nothing disturbed John Marshall. If he had only bread to eat ...it was just as well; if only meat it made no difference. If any of the officers murmured at their deprivations, he would shame them by his own exuberance of spirits. He was an excellent companion and was idolized by the soldiers and his brother officers, whose gloomy hours were enlivened by his inexhaustible fund of anecdote. '...Marshall was the best tempered

26 Marshall, Autobiography, 6.

27 Henry Hitchcock, The Development of the Constitution, G.P. Putnam's Sons, New York, 1889, 10.

man he ever knew'.²⁸

Hitchcock also gives some information from Marshall's military career which throws clues into view as some influences in the life of the Chief Justice's work on the Supreme Court of the United States.

...his comrades, who regarded him, says a contemporary, as not only brave but signally intelligent, and constantly appealed to him as arbiter of their disputes, often employed him as Judge Advocate. He became personally acquainted with Washington and also with Alexander Hamilton, then a member of Washington's staff, whose unreserved friendship he afterwards enjoyed, and of whose consummate ability and inestimable public services as soldier and statesman he held the highest opinion.²⁹

As commendable as were Marshall's actions in battle, it is the search for those influences in his life which had considerable bearing on his political philosophy which has led to an examination, to this brief extent of the experiences of John Marshall, the soldier. The affects of his military experience and the influence of some of the personalities he met, led and followed were most profound. One wonders in passing to what extent did the differences between the capacities in which Marshall and Jefferson served their country during those years of Revolutionary crisis affect their subsequent political antagonism, influence their estimates of each other as men and political leaders, and shape their views on government. Even the restrained Washington in a letter to Benjamin Harrison, Speaker of the Virginia House of Delegates said:

I am alarmed and wish to see my country-

28 Henry Howe, Historical Collections of Virginia, Wm. R. Babcock, Charleston, 1856, 266.

29 Hitchcock, 10.

men aroused. -I have no resentments...but in the present situation of things cannot help asking- where is Mason, Wythe, Jefferson, Nicholas Pendleton- and another I could name....³⁰

Jefferson was to be found in the Virginia legislature. He had resigned his seat in Congress because of more pressing business at home. It is only fair to Jefferson to point out that he was serving as he felt he could serve best. Jefferson was a philosopher and a leader in government. He was not a warrior. In 1778 Marshall could be found with the immortal "father of our country," whose views on a strong central government he shared and to whom he was bound with a strong personal devotion and admiration.³¹ It is to the scenes of the blood, hunger, privation and human suffering which marked America's struggle for freedom that we may trace the genesis of Marshall's unmovable nationalist convictions. His experiences as a soldier fortified him for the great work which lay ahead of him, that of bending the Constitution in such a fashion as to bind the states in indissoluble subordination to a strong, capable, ever progressing general government. Marshall witnessed the conditions at Valley Forge and was struck by the realization that the weak central government under the Articles of Confederation had been helplessly shackled by the selfish monster, state sovereignty. Without a sufficiently strong central government, the states were left to do as they wanted to. Some states clothed their troops, others did not. Some states, "...actually interfered in

30 Worthington C. Ford, editor, Writings of George Washington, G.P. Putnam's Sons, New York, 1890, VII, 301. Hereafter cited as Washington's Writings.

31 Santvoord, 309.

direct and fatal fashion with the Continental army itself."³² Marshall spoke of the shortcomings and weaknesses of the government under the Articles of Confederation as being attributable in large measure to the framers of the Articles, who possessed enthusiasm untempered by experience.³³ Marshall's most thorough biographer, Senator Albert Jeremiah Beveridge, concludes that, "...in his service as a soldier in the war for our independence, we find the fountainhead of John Marshall's national thinking."³⁴

After the campaign of 1779 was closed and the army had gone into Winter quarters, Marshall and other officers from Virginia were ordered back to Virginia to take command of whatever troops the state might raise.³⁵

During this period of inactivity, Marshall visited his father who was then commanding at Yorktown. It was there he met Mary Ambler, daughter of Jacqueline Ambler, State Councillor, and began the courtship which was an added incentive to his desire to begin study for his profession.³⁶ Announcing his intention to begin study, the young officer, whose mind was set on marrying Miss Ambler as soon as her age and his circumstances would permit, enrolled at the College of William and Mary and attended lectures given by Chancellor George Wythe for a short period during the winter of

32 Beveridge, I, 146.

33 Ibid., 147.

34 Ibid.,

35 Santvoord, 311.

36 Palmer, Marshall and Taney, 57.

1780.³⁷ He left the college quite suddenly and returned to Fauquier County where he was admitted to the bar on August 30, 1780.³⁸ It should be remembered that Marshall was still in the army, and he remained in the service of his country until 1781, there being an excess of officers in Virginia. Having been admitted to the Virginia bar, Marshall's illustrious career was formally launched. The question may logically arise as to his fortune at the bar. A keen interest might also evolve as to what extent did his exertions and success at the bar foreshadow his monumental work on the bench. Magruder wrote that, "Marshall rose rapidly at the bar. Once fairly launched in the career of practice his extraordinary abilities did not fail to make a strong impression on all who witnessed their display."³⁹ Flanders sought to explain the basis of the large support which Marshall received from the veterans of the Revolution. Marshall himself treated his legal relations with the ex-soldiers:

...they knew...that I felt their wrongs and sympathized in their sufferings, and had partaken of their labors, and I had vindicated their claims upon their country with a warm and constant earnestness.⁴⁰

Henry Hitchcock, another biographer of Marshall, explains, in part at least, the main factors in his success at the bar.

He rose rapidly to distinction, not by the arts of the advocate, for he had neither melody of voice, nor grace of style, but by sheer intellectual force, by an extraordinary clearness and penetration

37 Santvoord, 311.

38 Flanders, 23.

39 Allan B. Magruder, John Marshall, Houghton Mifflin and Co., Boston, 1888, 27.

40 Flanders, 25.

of mind and power of condensed statement.⁴¹

Undoubtedly Marshall's father's place in the affairs of the state influenced the young lawyer's fortune.

For the first year or two after his admittance to the bar, Marshall probably spent his time alternately between his father's "Oak Hill" plantation and Richmond. Mary Ambler's father had taken her and his family from Yorktown to Richmond. This proved a convenient arrangement; for in 1782 Marshall was elected to the Virginia House of Delegates from Fauquier County. As the legislature sat in Richmond and the object of his affections was there also, Marshall's marriage to Mary Ambler on January 3, 1783 was the normal outgrowth of the circumstances. His marriage to Miss Ambler, who later became an invalid, marks the happiest event in Marshall's life. His love and affection for her were known by all his associates and enhanced his already towering stature among men. Santvoord sought to show the great bond which existed between Marshall and his wife, who gave birth to five sons and one daughter,⁴² when he wrote:

This [Marshall's marriage] was one of the three events in his life which alone he deemed worthy of commemoration in the simple inscription, which two days before his death his own hand wrote to be placed on his tomb-his birth, his marriage, and his death! With this lady he lived nearly fifty years in the most devoted conjugal affection, and her death...cast a gloom over his thoughts from which he never recovered.⁴³

In a eulogy to his wife written on the first anniversary of her death and

41 Hitchcock, 11.

42 Oster, 200.

43 Santvoord, 313.

published for the first time in 1882,⁴⁴ Marshall himself gives clear evidence of the love and beauty which characterized his domestic life and provided an almost priceless background upon which he built his illustrious public career. The revealing eulogy was written on Christmas day, 1833, when Marshall was in his seventy-seventh year. Writing from the depths of a profound grief, Marshall said:

On the 25th of December, it was the will of Heaven to take to itself the companion who had sweetened the choicest part of my life, had rendered toil a pleasure, had partaken of all my feelings, and who was enthroned in the inmost recess of my heart. This never dying sentiment, originating in love was cherished by a long and close observation of as amiable and estimable⁴⁵ qualities as ever adorned the female bosom.

One can but read with satisfaction as his contemporaries observed with admiration the love of a great man, an intellectual giant, for his home and wife.

Some note has been made of how Marshall, through his military experience formed very definite feelings with regard to the relationship between the central government and the several states. Referring to the impression he received as a member of the Virginia legislature, Marshall wrote:

My immediate entrance into the State Legislature opened to my view the causes which had been instrumental in augmenting those sufferings [of the soldier's during the Revolution]; and the general tendency of State politics convinced me that no safe and permanent remedy could be found but in a more efficient and better organized general government.⁴⁶

⁴⁴ Oster, 202.

⁴⁵ Ibid., 203.

⁴⁶ Marshall, Autobiography, 40.

It becomes clear that the second distinct period in Marshall's life, his period of service as a Virginia legislator, was to exercise no little influence in the crystallization of his opinions as to the prostrating effect of competing and self-centered state governments on the very existence of a people who were seeking to thrive as a nation. It is, then, with considerable positiveness and careful circumspection that Marshall's experience in the legislature is emphasized as an additional source of his great partiality toward a vigorous general government. It is of some consequence that at the age of twenty-seven, as he took his seat among the legislators of his state, Marshall was not without predisposition on many of the issues on which he was required to act. His mind, as a result of the influences of his childhood, parents, and military service, had become bent in a direction from which it was never to turn or falter, regardless of the storm and fury with which men assailed his stand.

The student of American history will recall the period from the end of the Revolution to the adoption of the Constitution as a very uncertain and trying period in American history. With the victory in the war came a complex of problems connected with national self government and with a post-war period. The states had prosecuted the war far from complete accord with regard to their separate interests, sentiments, and resources. The government under the Articles of Confederation was hardly more than a "league of friendship" between the states forged in the white heat of adversity and necessity. After the war, many men and states opposed strengthening the central agency in any manner which would involve a sacrifice of individual state sovereignty. One historian, John Fiske, regards

the conditions in the country from 1783-1788 as more serious than at any other time in the nation's history.⁴⁷ While some students may regard Fiske's conclusion as somewhat exaggerated, it is hardly disputable that this period, during which John Marshall sat intermittently in the Virginia legislature, was indeed turbulent. Charles Warren, the constitutional historian, in listing the sources of the evils under the Articles of Confederation wrote that the chaos arose:

...first, from lack of power in the government of the Confederation to legislate and enforce at home such authority as it possessed, or to maintain abroad its credit or position as a sovereign Nation; second, from State legislation unjust to citizens and productive of dissensions with neighboring States-the State laws particularly complained of being those staying the process of the Courts, making property a tender in payment of debts, issuing paper money, interfering with foreclosure or mortgages, setting aside judgements of the Courts, interfering with private concerns, imposing commercial restrictions on goods and citizens of other States.⁴⁸

Another accomplished historian, Edward Channing, summarizes the state of affairs in America following the close of the Revolutionary war.

Helplessness was the keynote of the existing government. It was neither respected abroad nor obeyed at home. Interstate disorders were rule of the hour.⁴⁹

Such was the general condition of the country when John Marshall took his

47 John Fiske, Critical Period, Houghton-Mifflin and Co., New York, 1888, iii.

48 Charles Warren, The Making of the Constitution, Little, Brown and Co., Boston, 1928, 5-6.

49 Edward Channing, History of the United States, Macmillan Co., New York, 1912, 491.

seat in the Virginia legislature.

Marshall's acceptance in the legislature was attested by his appointment to the Committee of Courts and Justices and his election, by joint vote of both houses, to the Council of State in autumn of 1782.⁵⁰ Membership on this body was seldom given to young men, especially those serving their first term in the legislature. Marshall resigned from the Council. The legislature afforded opportunities for observation and study by him of important men and movements. During his service in the legislature, such notable men as Jefferson, Henry, Cabell, Lee, Tyler, Madison, Edmund Randolph and Benjamin Harrison displayed their talents in the service of the state.

It may be generally said of Marshall's legislative experience that it did not raise his low regard for the attitude and actions of the state government. He served intermittently as a member of the legislature through 1795. Of the legislative session in the fall of 1783 he wrote:

This long session has not produced a single bill of importance except that for the readmission of Commutables.....It ought to be perfect as it has twice passed the House. It is surprising that Gentlemen of character cannot dismiss their private animosities, but will bring them in the Assembly.⁵¹

Even Washington spoke with unusual extravagance of the work of the Virginia legislature. In a letter to Lafayette in 1788, the great soldier said:

...Virginia in the very last session...was about to pass some of the most extravagant and preposterous edicts.....that ever stained

50 Marshall, Autobiography, 7.

51 Ibid.

the leaves of a legislative code.⁵²

At every opportunity Marshall sought to give aid to the destitute veterans of war. He deplored the impotence of the central government, and the unwillingness of the states to do the fair thing on the debt issues that were in evidence throughout the nation. He witnessed the state's disregard for contracted obligations and their acts of provincialism, which obstructed them in their support of the treaty the central government had with England. Marshall expressed regret for some of the anti-debt resolutions passed in the Virginia legislature when he wrote to Monroe on December 2, 1784 saying:

...I wish with you that our assembly had never passed those resolutions respecting the British debt...because I ever considered it a measure to weaken the federal bands which in my conception are too weak already.⁵³

In obvious despondence Marshall appraises the work of the 1784 session of the legislature, "We have done nothing finally. Not a bill of public importance, in which an individual was not particularly interested, has passed."⁵⁴

With his practice at the bar growing, Marshall was gaining stature among the leading men of his state. He had settled himself in his Richmond home with his wife, who was an invalid. His participation in many important cases gave ample evidence of his mental habit and mode of thinking. He grew in poise, confidence, and in the eyes of his colleagues, and the

⁵² Washington's Writings, I, 208.

⁵³ Beveridge, I, 228.

⁵⁴ Ibid.

people. Most important of all, his witnessing at first hand many of the maladies that had threatened the very life of the country during the war and the greed and provincial mindedness of the state legislatures gave depth and fullness to his rapidly crystallizing nationalist views.

Of Marshall's work in the political affairs of Virginia, many consider that on behalf of the adoption of the Constitution, which had been drafted in Philadelphia in 1787, the most significant. After the Constitution was completed in September of 1787 and there began the debates as to its worth, it became clear to all who favored a union capable of surviving the particularist stormings of the states, that the fight was to be bitter and the decision close. In Virginia the fight was conducted with unequal violence, unsurpassed eloquence and impressive parliamentary skill by both sides. In the thick of this fateful battle was the future Chief Justice of the Supreme Court of the United States, whose defense and construction of the Constitution were to render it capable of being the fundamental law of the land. The national picture at this time was most grave. The Articles of Confederation were serving as the constitution for the Confederation which the states had formed. Much of the unrest was due, as has been noted, to the weakness of the central government. The problems of producing a national and stabilized medium of exchange, paying the war debt, enforcing the terms of the treaty with England, securing foreign credit, maintaining an army, paying the veterans of the Revolution, collecting revenue, levying duties, and settling the problems of interstate trade were of such magnitude as to render the Congress of the Confederation helpless to effect their solution. Washington, on being requested by one of

the leading men in the country to use his influence to bring order in New England, responded in a letter to Richard Henry Lee on October 31, 1786 by writing:

Influence is no government. Let us have one by which our lives and properties will be secured, or let us know the worst of it at once. To be more exposed in the eyes of the world, and more contemptible than we already are, is hardly possible.⁵⁵

The great soldier wrote from Mt. Vernon to Madison in November, 1786 that, "No morn ever dawned more favorable than ours did; and no day was ever more clouded than the present....We are fast verging to-ward anarchy."⁵⁶

There was among the people a strong aversion to strengthening the national government. Many of the leading men expressed a lack of faith in the people and in the government. The well informed James Madison wrote to Randolph in January of 1788 that:

There are subjects to which the capacities of the bulk of mankind are unequal and on which they must and will be governed by those with whom they happen to have acquaintance and confidence.⁵⁷

David Humphries, in a letter to Washington, sought to convey the attitude among the people at this time regarding the large number of public and private debts. "...there is a licentious spirit prevailing among many of the people, a levelling principle; and a desire of change; with a wish to annihilate all debts public and private."⁵⁸ In Massachusetts, Shay's

55 Washington's Writings, XI, 76-77.

56 Ibid., 81.

57 Gaillard Hunt, Editor, Writings of James Madison, New York, 1900-10, V, 81. Hereafter cited as Madison's Writings.

58 Beveridge, I, 299.

rebellion was the outgrowth of the threatened anarchy which hung over many of the states. Marshall said in reference to the rebellion that:

The restlessness of individuals, connected with lax notions concerning public and private faith and erroneous opinions which confound liberty with an exemption from legal control produced...licensed conventions, which, after voting on their constitutionality, and assuming the name of the people, arrayed themselves against the administration of justice...the ordinary recourse to the power of the country was found insufficient protection, when the appeals to reason were attended with no beneficial effect.⁵⁹

Many saw in the acceptance of the proposed Constitution, which concentrated so many powers in the hands of the central government, the sabotaging of both individual and state rights. The cry went up that a stronger central government would mean more taxes.

In his short autobiographical sketch, Marshall discloses the factors which persuaded him to enter so unreservedly into the fight for the adoption of the Constitution in Virginia.

The questions...which were perpetually recurring in the state legislatures and which brought annually into doubt principles which I thought most sound, which proved that everything was afloat, and that we had no safe anchorage ground, gave a high value in my estimation to that article in the constitution which imposes restrictions on the states. I was consequently a determined advocate for its adoption, and became a candidate for the convention to which it was to be submitted.⁶⁰

59 Ibid.

60 Marshall, Autobiography, 10.

The above statement from the great nationalist seems most significant as one brings to mind the vigorous, sustained and successful fight, Marshall, as Chief Justice of the Supreme Court, waged to decidedly subordinate state to national authority. Here he, himself, casts into focus a factor in his nationalist inclination.

However, many of the voters in Marshall's own County, Henrico, did not share his favor toward the proposed Constitution. In Virginia, as elsewhere, there were great forces at work among the people which strengthened the ranks of those who opposed the strengthening of the union. Of the anti-nationalist influences among Americans in 1787, Beveridge wrote;

...these three and a quarter millions of men, women, and children did not, for the most part, take kindly to government of any kind. The great majority of the people seldom saw a letter or even a newspaper, and the informed did not know what was going on in a neighboring state, although anxious for information.⁶¹

In spite of the strong anti-Constitution views held by many of his constituents, and the common knowledge among the people that Marshall was an ardent constitutionalist, he was elected as a delegate to the Virginia Convention called to ratify the Constitution which met on June 2, 1788. Marshall contributed to the historian's comprehension of these elections of delegates to the Virginia Convention.

A great majority of the people of Virginia was anti-federal; but in several of the counties most opposed to the adoption of the constitution, individuals of high character came forward as candidates and were elected from personal motives.⁶²

61 Beveridge, I, 284.

62 Marshall, Autobiography, 11.

The battle over the ratification of the Constitution was prosecuted with great sincerity, vigor and skill by both the friends of the Constitution and by its opponents.

...it may be safely said that no deliberative assembly ever met in any state more imposing for character, or more renowned for the moral and intellectual gifts and endowments which adorned it than this Convention of 1788.⁶³

It was amid great public interest that the Virginia Convention opened in June of 1788. Marshall chose to defend the features of the Constitution with which he was most familiar. These were the powers of the President to call out the armed forces, the plan of the judiciary as set up in the Constitution, and the taxing power. These powers seemed to threaten the very existence of the personal liberties which the anti-constitutionalists esteemed so highly. To many people it seemed the height of inconsistency for anyone to sponsor the Constitution and claim also to be a lover of freedom and liberty. Patrick Henry led the ranks of those who opposed the Constitution in Virginia, and was among those who saw in the new plan a tendency toward the monarchical system and the establishment of tyranny. After admitting that the new plan of government might prevent licentiousness, Henry countered with the charge that, "...it (the new plan of government) will oppress and ruin the people."⁶⁴ To those who held, with Henry, that the Constitution was an instrument of oppression and would

⁶³ Magruder, 63-64.

sap the liberty of the people, Marshall, in one of his rare but effective appearances on the floor of the Convention replied.

Mr. Chairman, I conceive that the object of the discussion now before us is, whether democracy or despotism shall be eligible. The supporters of the Constitution claim the title of being firm friends of liberty and of the rights of mankind. They say they consider it as the best means of protecting liberty. We, sir, idolize democracy.⁶⁵

It is understandable that Marshall and Washington, the ex-soldiers, who had suffered so at the hands of the disunionists tendencies of the state governments during the war for independence, should be able to speak so strongly in support of the proposition that liberty and freedom would but perish in the absence of a central government competent to their protection.

While the Virginia Convention was still in session and engaged in serious debate, news arrived that New Hampshire had become the ninth state to ratify the Constitution, thus completing its technical adoption. The anti-constitutionalists had argued strongly for amending the document as a condition to ratification; but at the last moment, Henry resigned his cohorts to the hope of amending the Constitution after it was put into effect. The fiery spokesman for the masses sheathed his sword saying:

If I shall be in the minority, I shall have those painful sensations which arise from a conviction of being overpowered in a good cause. I shall therefore patiently wait in expectation of seeing that government changed, so as to be compatible with the safety, liberty,

65 Ibid., 222.

and happiness, of the people.⁶⁶

Following Henry's last remarks, Randolph spoke very briefly. The vote on the ratification of the Constitution gave the victory to the constitutionalists by a margin of eight votes.⁶⁷ Marshall paid tribute to the Convention of which he was such an integral part when he wrote that:

After an ardent and eloquent discussion to which justice never has and never will be done, during which the Constitution was adopted by nine states, the question was carried in the affirmative by eight voices.⁶⁸

That the American nation hovered perilously close to serious dissension can be seen from the firmness and vigor of the battle between the friends and foes of the Constitution, and the small margin by which many of the states ratified the Constitution. Washington in a letter to Pinckney on June 28, 1788, wrote that, "...it was nearly impossible for anybody who has not been on the spot to conceive what the delicacy and danger of our situation have been."⁶⁹ Of the criticalness of this period Justice Joseph Story in the year of Marshall's death, 1835, and only forty-seven years after this crisis said that, "It is difficult, perhaps impossible for us of the present generation to conceive the magnitude of the danger which then gathered over our country."⁷⁰

Following the close of the Virginia Convention, Marshall again set his heart and mind on retirement from public life. It is not difficult to appreciate the satisfaction which he felt upon the adoption of the Constitu-

66 Ibid., 652.

67 Ibid., 654.

68 Marshall, Autobiography, 11.

69 Ford, Writings of Washington, XI, 285.

70 Dillon, III, 346.

tion by a sufficient number of states. Marshall felt that a plan of government had been adopted which was competent to effect the objects set forth in its preamble. He supplies the explanation of his conduct regarding his public career in the months immediately following the close of the Virginia constitutional Convention:

I willingly relinquished public life to devote myself to my profession. Indeed the country was so thoroughly anti-federal, and parties had become so exasperated that my election would have been doubtful. This, however, was not my motive for withdrawing from the legislature. I felt that those great principles of public policy which I considered as essential to the general happiness were secured by this measure [the ratification of the Constitution] and I willingly relinquished⁷¹ public life to devote myself to my profession.

Marshall about this time declined the pressing invitation of his supporters to become a candidate for Congress in 1788, an office to which he felt he could have been elected.⁷²

In spite of his strong desire to follow his practice, his love of his country and his desire to see a strong central government dissolve the impediments to national harmony and progress drew him back into the arena of public service. The urgings of his supporters for him to return to the legislature bore fruit, and in the latter part of 1788 he again became a candidate for the Virginia legislature. He later wrote that, "I yielded to the general wish partly because...I found hostility to the government so strong in the legislature as to require from all its friends all the support

⁷¹ Marshall, Autobiography, 11.

⁷² Ibid.

they could give it."⁷³ In his work, The Life of George Washington, Marshall describes the interaction of centripetal and centrifugal forces in the nation immediately following the adoption of the Constitution. The country was:

...divided into two great political parties, the one of which contemplated America as a nation and labored incessantly to invest the federal head with powers competent to the preservation of the union. The other attached itself to the state government, viewed all the powers of Congress with jealousy, and assented reluctantly to measures which would enable the head to act in any respect, independently of its members.⁷⁴

The large anti-Constitution minority had by no means given up their fight to alter the Constitution which had been ratified over their objections. Securing a majority of the seats in the General Assembly the foes of the new government elected two devout anti-Federalists to the new Congress. They were Grayson and Richard Henry Lee. With critical eyes and ready censure did many of the people and leaders watch the launching of the new government under George Washington. In spite of the high esteem in which Washington was held in his native state, Virginia led the union in the fight against those actions of the central government to which she took serious exception. In 1792, after having served continually in the legislature from 1788, Marshall declined reelection and devoted himself exclusively to his practice. It is said that he was employed in almost every important case in both the state and federal courts.⁷⁵

73 Ibid., 13.

74 John Marshall, The Life of George Washington, C.P. Wayne, Philadelphia, 1804, V, 33.

75 Macgruder, 89.

While Marshall was engaged in the practice of law during the early years of the decade of the 1790's, Washington, to whom Marshall was very devoted, was experiencing trying days at the helm of the ship of state. Not the least among the problems facing the Commander-in-Chief, was the delicate state of the nation's foreign relations due to the conflict between England and France in Europe. The irregular conduct of the French Minister, Genet, the Secretary of States' sympathy for the French cause and the desire of our businessmen for trade with England contributed to the perplexity of the government's problems. Washington's demand that Genet be recalled incited anew the widespread opposition to nationalistic tendencies of his administration. It was during this period of anxiety over a possible war with one of the western European powers that Marshall wrote to a friend, Judge Archibald Stuart, that:

Seriously there appears to me everyday to be more folly, envy, malice, and damned rascality in the world than there was the day before; and I do verily begin to think that plain downright honesty and unintriguing integrity will be kicked out of doors. We fear, and not without reason, a war. The man does not live who wishes for peace more than I do, but the outrages committed upon us are beyond human bearing.⁷⁶

In view of the complexion of Anglo, French and United States relations, Washington issued his Proclamation of Neutrality on April 22, 1793.⁷⁷ Some attention may well be given to Marshall's attitude on the matter. Although he did not hold a public office at the time Washington issued the proclama-

⁷⁶ Oster, 64.

⁷⁷ Channing, V, 129.

tion, Marshall allied himself with that minority in Virginia that supported the policy of the government. There was a practice of holding public meetings of the citizens of Richmond when opposition or support of large public issues was to be incited. It was at one of such meetings held in Richmond that Marshall drew up and ardently supported a set of resolutions which approved the policies of the government and acclaimed with warmest approbation Washington's Proclamation of Neutrality.⁷⁸ For his exertions on behalf of the government, Marshall was rewarded with the bitter opposition of many of the leading citizens of his native state.

The resentments of the great political party which led Virginia had been directed toward me for some time, but this measure [his resolutions favoring Washington's Proclamation of Neutrality] brought it into active operation. I was attacked with great violence in the papers and was so far honored as to be associated with Alexander Hamilton, at least so far as to be termed his instrument. With equal vivacity I defended myself and the measures of the government. My constant effort was to show that the conduct of our government respecting our foreign affairs was such as justify self-respect and a regard for our rights as a sovereign nation rendered indispensable
⁷⁹

Following the ratification of the Jay Treaty with England, there developed a still stronger opposition to the Washington administration's foreign policy. Resolutions at a meeting of the citizens of Richmond denounced the treaty as, "...insulting to the dignity, injurious to the interests, dangerous to the security and repugnant to the Constitution of

⁷⁸ Ibid.

⁷⁹ Ibid.

the United States."⁸⁰ Marshall wrote that:

Throughout that part of the year which followed the advice of the Senate to ratify Mr. Jay's Treaty, the whole country was agitated with that question. The commotion began at Boston and seemed to rush through the Union with a rapidity which set human reason and common sense at defiance....strange as it may appear, there was scarcely a man in Virginia who did not believe that a commercial treaty was an infringement of the power given Congress to regulate commerce. On this occasion too, a meeting of the citizens of Richmond was convened and I carried a series of resolutions approving the conduct of the President.⁸¹

As can be seen, John Marshall's sincere desire to see the general government succeed and his loyalty to Washington kept him from assuming a detached view of the large scale attacks made on the Washington administration's foreign policy. He felt that Washington's action in connection with the French Minister Genet, and the provisions of the Jay Treaty with England were not the justified objects of the charges levied against them. Fisher Ames in a speech in the House of Representatives after the Jay Treaty had been ratified and exchanged charged that, "...the opposition to the treaty was political, was not based upon the provisions of the instrument, but was due to desire to inflame the public passions against the government."⁸² James P. Root gives a better picture of Marshall's work in support of the treaty:

Meetings were held in Richmond and the

80 William H. Rawle and Mr. Chief Justice Waite, Exercises at the Ceremony of Unveiling the Statue of John Marshall, Govt. Printing Office, Wash., 42

81 Marshall, Autobiography, 16-17.

82 Channing, IV, 146.

treaty was fiercely denounced. Marshall now came to the rescue and before a meeting of the citizens of that place, made such an unanswerable argument in favor of the treaty, that the men who had been foremost in assailing it now united in the adoption of resolutions indorsing the policy of the administration. In the legislature his efforts were equally successful....President Washington attached so much importance to these services that he offered to his old friend and comrade the position of Attorney-General of the United States, but Marshall declined the offer, as he wished to devote himself to his practice which now had become very large.⁸³

Just as Marshall's speeches in support of the administration won him the active opposition of the leading party in Virginia, they brought him national recognition. The desire of his friends to have him once again in a seat in the Virginia Assembly so that he could attack and counter attack the opponents of the general government, led to his reelection, against his personal wishes, to the Assembly in 1795.⁸⁴

The ratification of the Jay Treaty by the Senate only heaped fuel upon the fires of discord between the United States and France. James Monroe had been dispatched to Paris, where he arrived in August, 1794, in an effort to effect an understanding with the French government, which was in the throes of the struggles between revolutionary factions. Monroe was recalled by Washington in August of 1796, after the French government's full knowledge of the Jay Treaty had placed him in a difficult position. Charles Cotesworth Pinckney, a staunch Federalist, was sent to Paris to carry out

83 James P. Root, The Chicago Times, "John Marshall," April, 1887, I, No. 2, 110.

84 Flanders, 7.

Monroe's original object, an agreement with the French government. Pinckney's strong Federalist sympathies, formal English education, and high station in the southern slave-holding aristocracy rendered him an unfortunate choice.⁸⁵ The Directory refused to carry on any negotiations with Pinckney and accented its attitude toward Pinckney by the regretful and affectionate manner with which it bade Monroe goodbye.⁸⁶

About this time Washington handed over the reigns of the government to John Adams, who took two steps in meeting the French-American crisis. He appeared before Congress and explained the crisis and made certain recommendations. As a result of his appearances, measures were taken to send a mission to France made up of three men appointed by Adams. John Marshall, Charles C. Pinckney and Francis Dana were the original appointees to the Mission. Dana refused to go; and Eldridge Gerry, an old political associate of Adams, whom many of the Federalists distrusted, was appointed in his place.⁸⁷ Marshall wanted to decline, but felt impelled to accept in view of the gravity of the situation.

By October 5, 1797, Marshall, Gerry and Pinckney were in Paris and had announced their presence to the Directory, there then followed one of the most unusual series of negotiations with a foreign power in our national history. Marshall wrote of the receipt of the American Mission by the French government that, "It was received with indignation...open contumely

85 Channing, 178.

86 Ibid., 179.

87 Ibid., 182.

and undisguised insult...."⁸⁸ The French Minister, Talleyrand, through the employment of agents, claimed that France had been so injured by President Adams' speech to Congress reporting the French acts of seizure on the high seas, that only the payment of money by the United States to France could repair the damage.⁸⁹ The negotiations proved fruitless, but the quality of the reports which Marshall dispatched and the honorable action of the Mission won respect. President Adams wrote that, "'Of the three envoys to France, the conduct of Marshall alone has been entirely satisfactory, and ought to be marked by the most decided approbation of the public.'"⁹⁰

Two of the envoys, Marshall and Pinckney were given their passports and returned to America. Marshall upon arriving was given a great reception by the Federalist leaders and many of the people. At a banquet in his honor in Philadelphia on June 18, 1798 the historic slogan, "Millions for defense but not a cent for Tribute", was coined.⁹¹ Returning to Virginia where he was well received, Marshall resumed his law practice with a renewal of that old resolution to give up public life. Ben W. Palmer has placed great importance on Marshall's work as a member of the French Mission. He wrote:

The XYZ Mission marked the turning point in his career. It made him a conspicuous figure in national life. It demonstrated his judgement, wisdom, his patriotism, and his power. He was offered a place on the United States Supreme Court, but because of financial necessities reentered

88 Hitchcock, 15.

89 Beveridge, II, 291.

90 Ibid., 378.

91 Ibid., 349.

private practice.⁹²

The appointment to the Supreme Court to which Palmer refers was occasioned by the death of Mr. Justice Iredell and tendered by John Adams, in 1798. However, Marshall decided in September, 1799, to run for Congress. This decision came after he had been invited to Mt. Vernon and had received the sincere and personal urgings of Washington to enter the race for Congress. Marshall wrote of this significant conversation with this great statesman, which was the direct impetus to his entrance into national politics:

I returned to Richmond with a full determination to devote myself entirely to my professional duties....General Washington gave a pressing invitation to his Nephew...and myself, to pass a few days at Mt. Vernon. He urged both to come into Congress....I resisted, on the ground of my situation and the necessity of attending to my pecuniary affairs. I can never forget the manner in which he treated this objection. He said there were crises in national politics which made it the duty of the citizen to forego his private for the public interest. We were in one of them [the French-American controversy]. He...expressed his conviction that the best interests of our country depended on the character of the ensuing Congress. I yielded to his representations and became a candidate.⁹³

Thus comes to light the great personal influence that Washington exercised on Marshall. Washington's love and great personal sacrifice for the union were no small factors on Marshall's desire to fortify the central government. One can see the hardening and projection of Marshall's nationalist conviction.

92 Palmer, 59.

93 Marshall, Autobiography, 25-26.

tions as shaped by the experience and political philosophy of his father's friend, the nation's peerless protector, and the object of Marshall's unbounded admiration.

Marshall's election to Congress was strongly opposed by the opponents of the Federalists, with whom, he had become associated because of his strong nationalistic views. In spite of strong opposition, Marshall was elected by a narrow margin. It is most interesting to note that in his election to Congress, from where he launched his long and historic fight against particularism, Marshall got some very decisive support from the great opponent of nationalism and apostle of state rights, Patrick Henry. Indeed the same Henry whom Marshall had respectfully and ably fought on the floor of the Virginia Constitutional Convention, which staged, perhaps, the greatest debate on the Constitution in the nation's history,⁹⁴ came to Marshall's support in a very positive fashion.

So intense was the anti-Federalist opposition in one of the bitterest campaigns in the history of Virginia that, notwithstanding his popularity, Marshall was successful only by a narrowest margin. It was a letter from Patrick Henry on the very eve of the election that saved him from defeat. Favorably reviewing Marshall's career, Henry referring to the XYZ Mission said, 'Tell Marshall I love him, because he felt and acted as a Republican, as an American'. Henry placed him [Marshall] next to Washington.⁹⁵

After his election Marshall took his seat in the Congress. One of his first duties, December 19, 1799, as a member of that body was to announce

⁹⁴ Beveridge, I, 476.

⁹⁵ Palmer, 60.

the death of George Washington which occurred on December 14, 1799. In his eulogy to John Marshall, Horace Binney casts some light on the setting in the House as Marshall spoke on that solemn occasion. Binney said:

Those who were present on the occasion can never forget the suppressed voice and deep emotion with which he introduced the subject on the following day; or the thrill which pervaded the House at the concluding resolution which ascribed to Washington transcendent praise and merit of being 'first in war, first in peace and first in the hearts of his countrymen.'⁹⁶

Perhaps Marshall's own words on that occasion will better reflect the high estimation which he held of Washington. On December 19, 1799, the day that Washington's death was confirmed, Marshall rose and paid glowing tribute to the hero of the Revolution.

More than any other individual, and as much as to one individual was possible, has he contributed to found this, our widespread empire, and to give to the western world independence and freedom.⁹⁷

Perhaps the most important and decisive debate in which Marshall participated while in Congress was the debate over the Livingston Resolutions. The issue stemmed from the case of Thomas Nash, more widely known under his assumed name of Jonathan Robbins, who falsely alleged himself to be an American citizen who had been impressed into the British navy.⁹⁸ He had committed murder on a British vessel and was arrested for that crime in Charleston, South Carolina at the request of the British Consul. President Adams, in conformance with a provision of the Jay Treaty, ordered Nash

⁹⁶ Dillon, III, 311.

⁹⁷ Macgruder, 40.

⁹⁸ Ibid., 143.

surrendered to the British authorities. This action by Adams incited widespread resentment in the United States. Many Americans felt that Nash was really an American citizen, and deeply resented Adams' action. Livingston, a member of the House from New York offered a set of resolutions censuring the President for his action, charging him with exceeding the bounds of executive authority and trespassing upon the functions of the judiciary. Since the question hinged strongly on points of constitutional and international law, Marshall was particularly equipped to discuss the matter.⁹⁹ In a speech which won him the respect of all his colleagues, Marshall defended the President. Binney said of Marshall's speech that:

The speech which he delivered upon this question is believed to be the only one which he ever revised, and it was worthy of the care. It has all the merits, and nearly all the weight of judicial sentence. It is throughout inspired by the purest reason and most copious and accurate learning. It separates the executive from the judicial power by a line so distinct and a discrimination so wise that all can perceive and approve. It demonstrated that the surrender was an act of political power which belonged to the Executive; and by excluding all such power from the grant of the Constitution to the judiciary, it prepared a pillow of repose for that department, where the success of the opposite argument would have planted thorns.¹⁰⁰

The report has been circulated that Albert Gallatin, a competent and respected member of the House was to make a reply to Marshall's speech. However, when, towards the close of Marshall's discourse, a friend approached Mr. Gallatin and asked if he intended to answer Marshall, Gallatin said,

⁹⁹ Wheaton, Appendix, Note 1, 31-32.

¹⁰⁰ Dillon, III, 312.

"There's no reply to make, for his speech is unanswerable."¹⁰¹

The issue over the Alien and Sedition laws brought out the opposition party in full battle array. These laws had been passed at the session of Congress prior to Marshall's entrance. The issue was provided by the desire of the anti-Federalists to repeal the second section of the Sedition law, which constituted the sedition features of the act. Marshall voted for the repeal of the act. Magruder wrote that:

Marshall's cool judicial sense made him fully cognizant of their objectionable character, and he could not be driven by the party whip to support them. Marshall's honesty disapproved of it and he voted for its repeal.¹⁰²

After he had begun his term in Congress, Marshall was appointed to the cabinet post of Secretary of War by President Adams without his knowledge. When he inadvertently learned of his appointment, he declined the office.¹⁰³ However, after Congress adjourned on May 14, 1800, Marshall was again invited to a seat in Adams' reshuffled cabinet. He accepted the post of Secretary of State after resigning his seat in Congress. He served as Adams' Secretary of State from the summer of 1800 until very early in 1801.¹⁰⁴

As Adams' Secretary of State, Marshall was destined to render commendable services. The records of his communications with American Ministers to foreign countries, and particularly to King in the Court of St. James,

¹⁰¹ Magruder, 148.

¹⁰² Ibid., 148-149.

¹⁰³ Marshall, Autobiography, 27.

¹⁰⁴ Ibid., 28.

give evidence of his devotion to his nation's welfare and the honor and dignity with which he filled the high office. Adams said, "...my new Minister, Marshall, did all to my entire satisfaction."¹⁰⁵ As one recalls the very trying times Adams had with many of his fellow-Federalists, and particularly those in his cabinet, Marshall's success as his Secretary of State reflects even greater credit on Marshall. He had not accepted the post without fighting that same contest within himself, as to continuing his public career or returning to his private practice, which had suffered irreparable losses since his election to Congress. Marshall had decided, before the second invitation from Adams came, to return to his private practice and to seek to revive it. Adams' offer of the post of Secretary of State posed the same old problem of a choice between a public and private career. Marshall would have followed his original intent and returned to his practice had not the anti-Federalist forces made such a loud and sustained assault on his acts and principles. He wrote later of his decision that:

This experiment I was willing to make, and would have made had my political enemies been quiet. But the press teemed with so much falsehood, with such continued and irritating abuse of me that I could not bring myself to yield to it. I could not conquer a stubbornness of temper which determines a man to make head against and struggle with injustice. I determined to accept the office Secretary of State.¹⁰⁶

Late in 1800, Chief Justice Oliver Ellsworth resigned as Chief Justice

¹⁰⁵ Flanders, 125.

¹⁰⁶ Marshall, Autobiography, 28-29.

of the Supreme Court of the United States. As Secretary of State, Marshall recommended that Adams appoint Judge Paterson, an Associate Justice on the Supreme Court. Adams rejected the suggestion on the sole ground that Judge Cushing, a senior member of the Court, would be offended at his nomination of the junior Justice.¹⁰⁷ Adams tendered the appointment to Jay, who declined. When Marshall presented the letter from Jay declining the nomination, Adams turned to him after a pause and said, "I believe I must appoint you."¹⁰⁸ The nomination, though held up temporarily by Judge Paterson's friends, was unanimously approved by the Senate. On January 31, 1801, John Marshall's appointment as Chief Justice of the Supreme Court of the United States became effective. John Adams, whose administration had fallen into disrepute, has a valid claim to historical distinction, however, if for no other act but the one through which he placed in that lofty seat of justice a man whose judicial career has no parallel in American history.¹⁰⁹

After surveying the life of John Marshall up to his appointment as Chief Justice, it seems that the concepts he held on the range and functions of the national government were the natural by-products of his personal experiences no less than they were the workings of his uncommon mind, which pursued with uncanny accuracy the avenues of reason and right. His robustness of mind, strength of body, as well as his purity of thought and nobility of endeavor, were the natural endowments of his parentage and the wild frontier life of his youth. While Marshall's strong attachment to the

107 Ibid., 29.

108 Ibid., 30.

109 Oster, 16.

central government was not the usual characteristic of the frontiersman, it can be partly accounted for by the fact that his vision and sense of value were not those possessed by many men of any station or origin in American life, then or now. While his character, bearing and other good qualities may be traced to his youth, the roots of his nationalist thinking stem from his experiences as a soldier in America's struggle for freedom. His experiences with Washington during those dark and uncertain years were the fountain-head of Marshall's nationalism. Palmer wrote that:

His experience was parallel with that of Washington; so also were his convictions with respect to national power. He saw an intense particularism, an overweening local pride, an excessive emphasis on the rights of sovereign states as members of a confederacy, an unjustified fear of the slightest centralization of power and authority. He saw the havoc these wrought; defeat in the Revolution barely averted, victory delayed, won only at unnecessary cost in men and money, a helpless confederacy viewed with contempt both at home and abroad and fast verging toward dissolution, anarchy within the states, actual or incipient civil war between them. Marshall had faced the issue squarely....He had publicly enrolled under ¹¹⁰ the banner of nationalism as against state rights.

Marshall's appointment as Chief Justice set the stage for that part of his life which was to be the most fruitful. It seems proper at this point to consider the general conditions of the nation in 1800, the eve of Marshall's beginning the work which was to earn for him the title of the "second maker of the Constitution" and, indeed, the "creator" of it. ¹¹¹

¹¹⁰ Palmer, 63.

¹¹¹ Ibid., 21.

CHAPTER II

THE UNITED STATES IN 1800

Perhaps the most obvious characteristic of American life in 1800 was its immaturity. The symptoms of the youthfulness of the United States pervaded all phases of activity- political, cultural, social and economic. While the wounds suffered in the bitter fight for independence were healing, the country had not made much progress in meeting and solving the many problems which are incidental to a prosperous national existence.

At the end of the eighteenth century the area of the United States was approximately 849,145 square miles. The census of 1800 gave the population at 5,300,000 as compared with 3,936,000 in 1790.¹ That America was mainly an agrarian nation can be shown by an analysis of the population distribution. The population of New England was approximately 1,400,000, and the Southern States had about 2,700,000 including slaves. The white population of the South seemed to be approximately one half that of the North. In 1800 the number of people in the eleven cities in the United States with more than five thousand inhabitants were: Philadelphia, 70,287; New York, 60,489; Baltimore, 26,614; Boston, 24,027; Charleston, 20,473; Providence, 7,614; Savannah, 7,523; Norfolk, 6,926; Richmond, 5,537; Albany, 5,349; and Portsmouth, N.H., 5,339.²

1 Jedidiah Morse, American Universal Geography, J. Stockdale, Boston, 1802, 223.

2 Figures taken from, Edward Channing, A History of The United States, Macmillan Co., New York, 1897, 160-162.

Even to the most favorably biased observer, America's physical conditions in 1800 could not have presented a very bright outlook. Reaching all along the Atlantic coast from Maine to Georgia, there seemed to be one unending mass of trees and forests, broken by intermittent clearings and a few concentrations of people in would be cities. There were actually two frontiers, the western frontier of the tidewater areas and the frontier of those settlements situated beyond the Alleghanies. "More than two-thirds of the people clung to the seaboard within 50 miles of tidewater."³ Felix De Beaujour, a Frenchman who served his country as an American Consul, described the general picture that the United States presented about 1800:

An eternal forest, cut into clear spaces or intervals, in which hamlets are placed; sown fields or ponds; streams intersecting these forests in various directions, and all descending from the double chain of the Alleghanys; to the west of these mountains, small swamps which issue into the large one where the Mississippi flows to the east, a low and level coast, scattered over with marshes, and, on this same coast, six large towns and an infinite number of small ones, all built of brick or wooden planks, painted in different colours, on every side, massive and lofty trees or forests of shrubs which hide the land; wherever the eye turns, it beholds a hideous soil and coarse atmosphere; nature in short, gloomy and unharnessed....

In 1800 there was developing an increased interest in the territory beyond the Alleghanys.

³ Henry Adams, History of the United States of America, Charles Scribner's Sons, New York, 1889, I, 1.

⁴ Felix De Beaujour, William Walton, Translator, Sketch of the United States, 1800, Mason-Holywell, London, 1814, 39.

The most significant social movement of the period 1789-1801 was the extension of the frontier beyond the mountains, which began before the Revolution, but after 1789, it proceeded more rapidly. In 1790 the total population of Kentucky, Tennessee and the Northwest was 109,000, in 1800 it was 377,000.⁵

There were three routes by which the wild unsettled territory beyond the Alleghanies was reached. They were from Philadelphia through to Pittsburgh, from the Potomac to the Monongahela and through the Cumberland gap into Kentucky.⁶ It has been estimated that through these routes had passed about five hundred thousand people into the West by 1800. The outstanding community beyond the Alleghanies was Kentucky, with 180,000 whites and 14,000 Negroes.⁷ The bonds between the wild frontier communities and the more sedate and socially conscious Atlantic coastal areas were weak indeed. However, some of the cities west of the Alleghanies which were destined to grow up and become meccas of industry and commerce were already begun. Pittsburgh, Cincinnati and Nashville were well on their way.

Back in the east, along the Atlantic coast, one can hardly find justification for the widespread optimism shared by the people, if he is to judge by the general appearance of the country. The main problems of the period were those of transportation and communication. There were few roads at all and most of them were in poor condition. One foreign observer wrote of American roads that:

5 John Spencer Bassett, The Federalist System, 1789-1801, Harper and Brothers, New York, 1906, 238-239.

6 Adams, I, 2.

7 Ibid., 5.

The roads which at present exist are no more than traced paths; on them the elevations have indeed been softened by cuts, and the land drained by ditches, but it would be necessary to case them with stone and cover them with gravel or broken flints and to construct causeways in the hollows....The bridges are neither more perfect or more numerous in the United States than the roads. But with the exception of these bridges [at Philadelphia's entrance and over the Delaware river at Trenton], and some short roads constructed round the large towns...all other means of communications are still less perfect in this country than in the least civilized in Europe.

Jefferson wrote to his Attorney-General of his difficulties in getting from Monticello to Washington; "...of eight rivers between here and Washington, five have neither bridges nor boats."⁹ The roads connecting Boston, Philadelphia and Pittsburg were uncommonly good. However, the farther south one went the more difficult traveling became.¹⁰ In the North the coaches were used for overland travel, and even they could not be used in the far South due to the poor conditions of the roads. In the North the rate of speed of the coaches averaged about four miles per hour.¹¹ The charge was about six cents per mile. Edward Channing explains that the lack of proper development in communication facilities was due to the absence during the early years of a sufficiently strong federal government.¹² However, the increase in commercial and cultural relations between men and states stimulated improvements in communication facilities. In 1789 there were

⁸ Beaujour, 36-38.

⁹ Adams, I, 14.

¹⁰ John D. Hicks, The Federal Union, Houghton Mifflin Co., New York, 1937, 263.

¹¹ Ibid.

¹² Edward Channing, History of the United States, Macmillan Co., New York 1907-1925, IV, 6.

seventy-five postmasters in office all over the country. In 1800 the number had been increased to nine hundred and three.¹³

Social conditions in the states were very little advanced from what they were fifty years before 1800. Social stratification, to the extent that it existed at all, had characteristics peculiar to the several geographic areas. In the North, "...slavery was practically extinct... every state, except New Jersey having since 1780 abolished slavery or set on foot some scheme which as a matter of fact ended in abolition."¹⁴ In the South, the social scene, in spite of its strong manifestations of culture in spots, was burdened heavily by the institution of slavery. It may be said generally that while colleges were in existence, education seemed to be marking time in 1800.

The period from 1789 to 1801 was not characterized by intellectual progress. Education had made little advance and literature was all but dead. The after effects of war and the tendency for all energies to run into physical recuperation were the chief causes. In 1800, the Harvard faculty consisted of the president, three professors and four tutors. In 1797, Bishop Madison, whose vacant parishes had caused him to suspend his episcopal functions and become president of William and Mary College, was teaching a group of barefoot boys. In literature the group known as the 'Hartford Wits' were most distinguished. Perhaps the best poetry of the day was Freneau's.¹⁵

In New England the social scene was dominated by the religious commercial oligarchy. There were in evidence many forces working to

13 Ibid.

14 Ibid.

15 Bassett, 175.

whittle down class barriers. Americans more and more, under the promptings of "Jeffersonian democracy," believed in the supreme worth of the individual. There were, however, in the larger New England cities, social distinctions based on wealth. "At the top of the social scale were the well to do merchants-shipping families...together with their lawyers and at a little economic distance, their physicians."¹⁶

In New England, climate, soil, and religion had produced in a century and a half a strongly individualized type, the Yankee, perhaps the most persistent ingredient of the American mixture. The Yankee was the American Scot; and New England was an eighteenth century Scotland without lairds. A severe climate, a grudging soil...and a stern puritan faith, dictated the four gospels of education, thrift, ingenuity, and righteousness. By necessity rather than choice, the New Englanders had acquired an aptitude for maritime enterprise and trading.¹⁷

As has been noted, the two largest cities in the United States were Philadelphia and New York. Philadelphia in 1800 had begun to yield its dominant commercial status to New York, which was rebuilding fast after the widespread destruction in the city caused by the Revolutionary fires. A contemporary historian wrote of Philadelphia and New York in 1800 that:

In point of commerce, the cities of New York and Philadelphia are to be esteemed as the most eligible situations in the United States. Both command a vast extent of trade, while at the same time they are the channels of supplying several other states....these two cities naturally vie with each other, and the superiority of either has hitherto been scrupled; as it must be clear.

¹⁶ John A. Krout and Dixon Ryan Fox, The Completion of Independence, Macmillan Co., New York, 1944, 29.

¹⁷ Samuel Eliot Morison and Henry S. Commager, The Growth of the American Republic, Oxford University Press, New York, 1937, 191.

from many concomitant circumstances in favor of Philadelphia...that city has the preference.¹⁸

Oliphant's views of the relative economic or commercial prestige enjoyed by New York and Philadelphia in 1800 are shared by most writers. Philadelphia had enjoyed its favorable commercial location for sometime. It had been the seat of the government and had played host to such momentous gatherings as the Continental Congresses and the Constitutional Convention of 1787. Culturally it was quite advanced over the other American cities, although Isaac Weld, a foreign traveller in Philadelphia in 1793, complained of the rigid social forms adhered to and the absence of gaiety in the social gatherings.

It is no unusual thing, in the genteelest houses, to see a large party from twenty to thirty persons assembled, and seated round a room, without partaking of any other amusement than what arises from the conversation, most frequently in whispers, that passes between the two persons who are seated next to each other.¹⁹

Weld took particular note of the homogeneity of the city's population, the beauty of the girls, and the fact that a combination of Quakers and conservatives had barred all public amusements in Philadelphia prior to 1779.²⁰

In New York in 1800, the observer sees a more varied combination of races and nationalities than in any other city in the country- a characteristic of the city which is no less true today. New York in 1800 was a star in its ascendancy. Its location at the mouth of the Hudson, its situation

18 Edward Oliphant, The History of North America and its United States, J. Johnston, Edinburgh, 1800, 209.

19 Isaac Weld, Travels Through the States of North America, John Stockdale, London, 1807, I, 22.

20 Ibid., 23-24

at the entrance to the Iroquois country, and the effects of such subsequent projects as the Erie Canal were to bolster it to the pinnacle of financial and commercial prosperity in America.²¹ The Dutch influence was quite pronounced in New York. The Dutch signs in front of businesses and the Dutch style of architecture were quite evident in New York.²² As was true of Philadelphia, commerce was the dominant impetus to New York's growth.

Boston in terms of population, was America's fourth largest city in 1800. Bostonians reflected the homogeneity of the New England population. Eli Whitney's invention of the cotton gin was not able to effect the displacement of the handicraft by the factory system until a generation later.²³ This was caused by the strong entrenchments which the section had made in commerce and ship building. William Janson, an Englishman who travelled in America between 1793 and 1806, was surprised to see the great commercial activity in the Port of Boston.²⁴

Boston was the metropolis not only of Massachusetts but of New England. It was intensely conservative...and complacent. Boston's commercial enterprise was chiefly advertised by the Long Wharf jutting a third of a mile into the water, through there were nearly eighty others, large and small. It's distinguished citizen George Cabot spoke simply the conviction of the section when he claimed, that there was among its people more wisdom than in any other part of the United States.²⁵

21 Morison and Commager, 195.

22 Krout and Fox, 17.

23 Morison and Commager, 193.

24 Charles W. Jansen, The Stranger in America, 1793-1806, The Press of the Pioneers, Inc., New York, 1935.

25 Krout and Fox, 11-13.

Although Charleston was in terms of population only the fifth largest city in the United States in 1800, it held a place of preeminence in the South's economy at the close of the eighteenth century. The social leadership of the South fell to the wealthy planters or large landowners. There was a large gap between the wealthy planters and small farmers. The distance was even greater between small farmers and the slaves. Except for a few at the top, the level of intelligence, wealth and comfort for those below was indeed low.²⁶ In the upper class of southern society there were genuine pretensions to culture and refinement. The main interest of the men of leisure was politics, and this to some extent was reflected in the large role which the South's sons played in the national government. While there was some reading done, it could not offset the woeful lack of schools. According to most writers, the main diversions in the South were drinking, sports and politics.²⁷ In South Carolina, however, there were to be found many features of society which were characteristic of the large northern urban areas. Charleston could boast of an advanced social and industrial personality which rivalled some of the northern cities. Charleston's commercial activity had a seasonal character caused by the severe heat during the summer months which drove many of the well-to-do merchants from the city into the upland country seeking relief. F.A. Michau, a Frenchman who travelled extensively in the South, observed of Charleston's activity that:

From the 1st of November till the month of
May the country affords a picture widely different;

²⁶ Morison and Commager, 201.

²⁷ Rev. Dr. Coke, Extracts of the Journals of the Rev. Dr. Coke's Five Visits to America, G.A. Paramore, London, 1793, 31.

everything resumes new life; trade is reanimated; the suspended communications re-commence; the roads are covered with wagons, bringing from all quarters the produce of the exterior....In short, the commercial activity renders Charleston just as lively as it is dull and melancholy in the summer.²⁸

John Davis, an Englishman who travelled in America between 1798 and 1802, gives some interesting information on the master-slave relationship in the South. He also shows that Charleston as a southern city was not only distinguished for its situation on the ocean as a port of entry, for the large scale commercial and industrial intercourse carried on by its citizens, for the gaiety and sumptuousness of the social activities during its winter seasons, but also for the sincere attachment to culture and literature professed by so many of its aristocracy.²⁹

In 1800 the capital of all banks in the United States including the Bank of the United States was less than twenty-nine million dollars. The national debt was about eighty million dollars. The foreign imports and exports balanced at about seventy-five million dollars. The amount of foreign commodities actually consumed in America was probably worth between forty and fifty million.³⁰ The foreign merchandise which was consumed in America in 1800 was paid for in exports of wheat, cotton, whale oil, salt fish, tobacco and profits from the West Indies shipping trade. The preponderance of American capital in 1800 was invested in commerce and agriculture. While New England had many industries, none of them was of impressive

28 F.A. Michaux, Travels to the Alleghany Mountains and Back to Charleston, B. Crosby and Co., London, 1805, 5-6.

29 John Davis, Travels in the United States of America, R. Edwards, London, 1803, 51-57.

30 Figures taken from Adams, I. 26-27.

size. Except for South Carolina, the South, with its complete dependence on the system of agriculture was declining fast. Henry Adams noted that in Virginia the migrations into Kentucky and Tennessee, the lack of fertility in the soil, and the Virginian's worship of the easy comfortable life near the coast, were factors which might have helped Virginia give the nation, "...the Virtues of Cato and perhaps the eloquence of Cicero, but was little likely to produce anything more practical in the way of modern progress."³¹ The country south of Virginia was most unpromising. However, South Carolina was such an exception for industry, resources, culture and situation that Adams wrote of it in 1800 that: "If any portion of the United States might hope for a sudden and magnificent bloom, South Carolina seemed entitled to it."³²

In spite of the fact that social conditions in the country were not much different to what they had been forty years before,³³ and the industrial revolution was a generation away, there were unmistakable signs of economic growth during the period following the adoption of the Constitution. Total exports had moved up from twenty million dollars in 1792 to more than sixty-one million in 1798 and up to slightly less than seventy million in 1800.³⁴ The total imports over the period went in value from thirty one million to ninety-one million.³⁵ A most important aspect of our foreign trade was the

31 Ibid., 32.

32 Ibid., 39.

33 Hicks, 261.

34 Oliphant, 84.

35 Channing, I, 5.

large quantity of it which was carried on with Great Britain. An English historian wrote of the great commercial dependence which the United States had on England:

...it must give pleasure to every Briton to see that three fourths of the whole Exports and Imports of America are carried on with this country. Indeed without the British trade, the United States would make no figure in commerce. The immense quantity and low price of land which draws all their capitals that way, would entirely annihilate commerce, were it not for the British capitals.³⁶

It was noted at the end of the eighteenth century that in the larger cities in America, Boston, Baltimore, Philadelphia and New York, the composition and manners of society were much the same as in the great cities in England such as Liverpool, Bristol, London, Manchester and Birmingham.³⁷

In many respects the glowing reports that were circulating throughout Europe as to the wondrousness of life in America at the end of the eighteenth century were unfounded.³⁸ The victory in the Revolution, the bloodless adoption of a constitutional form of government, the spread of the democratic concept throughout the country, and the immensity of land and resources struck sparks of optimism and nationalism in the hearts of many Americans. Americans were resolved to cast off their European heritages and rear in Americana great nation founded on autochthonous social, political, cultural and economic institutions. In 1800 one could only be struck by the favorable situation of the American people. The impression could not come solely from

³⁶ Oliphant, 34.

³⁷ Adams, I, 27.

³⁸ Krout and Fox, I, 22.

the state of things as they existed in 1800; anticipation was necessary.

When the extent of America is considered, boldly fronting the old world, blessed with every climate, capable of every production, abounding with the best harbours and rivers on the globe, and already overspread with millions of souls, partly descendants of Britain, inheriting all their ancient enthusiasm for liberty, and enterprizing almost to a fault; what may be expected from such a people in such a country. The partial hand of nature has laid off America upon a much larger scale than any other nation in the world. Hills in America are mountains in Europe, brooks are rivers, and ponds swelled into lakes. In short, the map of the world cannot exhibit a country uniting so many natural advantages, so pleasingly diversified, and that offers such abundant and easy resources to agriculture and commerce...tend to create pre-eminence of the American interest.⁴⁰

The broad and significant political events at the turn of the eighteenth century have prompted many historians to refer to this period as one of political revolution. Surely no one will deny that the Republican party's victory at the polls and the wide implications of the increasing participation in government by the average Americans make the political affairs of 1800 of decided significance. John Marshall took his seat a chief justice of the Supreme Court of the United States on the second Monday of February of 1801. No clear understanding of the great influence Marshall was to exercise on the American form of government can be realized without a knowledge of the political setting at that time.

John Adams was the man into whose hands was entrusted the direction of the executive branch of the government following Washington's retirement to

⁴⁰ Oliphant, 79.

Mt. Vernon. Washington's last administration had been plagued by the international turmoil of Europe, which had threatened to throw the new Republic into armed conflict. Adams encountered foreign problems more difficult than those Washington had faced.⁴¹ The French government was much more aggressive. While still smarting from the offense it took at the ratification of the Jay Treaty and embroiled in difficulties with England, it was advised by the French Ministers at Philadelphia that Jefferson's party would be gratified at a few acts of violence which the Directory might do to Federalist shipping.⁴² The Directory obliged by loosing its corsairs upon American shipping much to the injury of the commercially inclined Federalists. The exertions of the mission composed of Marshall, Gerry, and Pinckney proved fruitless in settling the difference between the two countries. When, upon Marshall's return home, the X.Y.Z. papers were published and a revelation was made of the attempts at bribery and coercion carried on by the French government under Talleyrand, Adams girded the country for war.

The papers were published by order of the Senate, and the effect throughout the country was the same that it was in Congress. For a time the Republicans were silenced and many of the lukewarm went over to the Federalists. The war spirit flamed up hot and fierce. Almost in despair, Jefferson opposed all warlike measures and fought for time that passions might have opportunity to cool. For the first and last time in his life, John Adams tasted the sweets of popularity. He was overwhelmed with addressed of approval. In Congress, so many went over to the Federalist

41 S.E. Morison, The Oxford History of the United States, Oxford University Press, London, 1927, I, 203.

42 Ibid.

side that between the twenty-seventh of March and the end of the session on the sixteenth of July, a score of warlike measures were carried through.⁴³

Washington was called from retirement to head the army. Adams and his Secretary of War, Knox, opposed Washington's preference for Alexander Hamilton as his second-in-command. This attitude has been considered by some students as an important factor in the breach that developed between Adams and Hamilton.⁴⁴ It was this breach that contributed so much to the fall of the Federalists.

After much pro-war spirit had been engendered during which a quasi-American-French war had actually existed, word came from Talleyrand in 1799 that he would receive the three commissioners whom Adams had appointed. They were Ellsworth, Davie and William Vans Murray. The mission which had been proposed by Adams proved successful in reaching an agreement with the French government and returned in 1800 with a reasonable guarantee of peace and undisturbed commerce.⁴⁵

The significance of the Franco-American controversy late in the eighteenth century to this study lies in the great exposure it gave to the cleavages between men and the irreconcilable differences of opinion between the two parties which had evolved. The bitter feelings between the followers of Jefferson, with their alleged pro-French sympathies, and the Federalists under Adams, accused of favoring a monarchical system, provided the setting for the revolution of 1800. Gouveneur Morris wrote to Rufus King on June 4,

⁴³ Elroy McKendree Avery, A History of the United States, The Burrows Brothers, Cleveland, 1910, 198-199.

⁴⁴ Ibid., 207.

⁴⁵ Bassett, 238-239.

1800 that, "...the thing which in my Opinion has done most mischief to the federal party is the Ground given by some of them to believe that they wish to establish a monarchy."⁴⁶ The Jefferson-Federalist split was rooted in the differences over the interpretation of the Constitution and the powers it delegated to the general government which sprang up in Washington's cabinet between Hamilton and Jefferson. Extended opposition to Hamiltonian or Federalist practices and views began when,

...at the close of the year 1793, Jefferson resigned from the cabinet....He began forthwith an ardent campaign to organize the vast mass of discontent not only in the south but all over the land into a political party Jefferson kept up an enormous correspondence with his co-workers from Maine to Georgia...he watched the march of the administration with jealous scrutiny.⁴⁷

Jefferson and his followers believed, among other things, in the theory of state rights, the corrupting influence of the large commercial classes, the freedom and dignity of the individual, the justice of the French revolutionists' cause, the unworthiness of the Jay Treaty, and a strict interpretation of the Constitution.⁴⁸ Franklin wrote to Jefferson of John Adams that he was constant in his honesty, great on several occasions, and "sometimes mad."⁴⁹ Adams with typical candor said of his own personality that:

46 Rufus King, Charles R. King, Editor, Life and Correspondence of Rufus King, G.P. Putnam's Sons, New York, 1896, III, 252.

47 David S. Muzzey, The United States of America, Ginn and Co., Chicago, 1922, I, 186.

48 Morison, I, 128-132.

49 Thomas Jefferson, Paul L. Ford, Editor, Writings of Thomas Jefferson, G.P. Putnam's Sons, New York, 1892-99, V. 104.

I have never sacrificed my judgement to Kings, Ministers, nor people, and I never will. When either side shall see I do, I shall rejoice in their protection, aid and honor: but I see no prospect that either will think as I do, and therefore I shall never be a favorite with either.⁵⁰

Bassett in his penetrating study, The Federalist System, evaluates Adams as a man, party leader and President:

He was tactless, immovable, honest, patriotic, and fearless. He was not a party leader and knew not how to arouse the enthusiasm of his supporters. He probably saved the country from war which the Pickering Federalists would have precipitated. He did not wreck his party, but he contributed toward its destruction. His part in that operation was a passive one. Had he been another kind of a man, he might have guided the forces that destroyed him; but it was other hands than his which set the wedge that vent Federalism.⁵¹

John Adams did possess wide experience in the conduct of government, and there were few who would contradict a statement crediting him with strong mental powers. One historian wrote that Adams:

...was vain, jealous of rivals, ready to suspect the worst where he suspected at all over imaginative, irascible stubborn, impatient of advice, apt to push his way in blind rage where his temper was aroused.⁵²

It is of value to note especially Adams' personality, because it was a factor in the political upheaval of 1800. The overthrow of the Federalists' regime cannot be attributed to a single cause. Charles Beard wrote of the

50 John Adams, Works of John Adams, Little, Brown and Co., Boston, 1850-1856, II, 564.

51 Bassett, 205.

52 James Shouler, History of the United States, Dodd, Meade and Co., New York, 1880, I, 506.

struggle between the Federalists and Jeffersonian followers that:

...the two parties were less divided about our foreign relations than about the internal measures of which the Alien and Sedition laws were the most prominent and obnoxious. No sooner were they passed than the nation was set aflame.⁵³

The Alien Law gave the President the authority to expel undesirables from the country. The Sedition Law was an attempt by Congress to curb written or verbal attacks on the government, President, or members of the national legislature. Bassett's comments on Marshall's views toward these Federalist laws reflect no small credit on Marshall.

Of the Federalist leaders, only Marshall opposed these bills openly. His legal mind could not approve this violation of natural rights, an attitude for which he was soundly denounced by the New England Federalists. Marshall had already begun to separate from the extreme wing of his party.⁵⁴

The passage of these laws by the Federalists in 1798 provoked intensified Republican opposition. The issue was made more trying for the Federalists by the fact that the measures were similar to some laws which had been passed by the English Parliament in 1793.⁵⁵ Several historians devote some space to an explanation of the action of the Federalists in passing these acts. It was then felt that the trend of American-French negotiations culminating in the publication of the X.Y.Z. papers, which bared Talleyrand's intrigues, could only result in an French attack on the United States.⁵⁶

⁵³ Charles A. Beard, Economic Origins of Jeffersonian Democracy, Macmillan Co., New York, 1915, 356.

⁵⁴ Bassett, 260.

⁵⁵ Morison, I, 217.

⁵⁶ Ibid., 212-213.

However, the witty Talleyrand took revenge for the exposé in his charges that the Federalists were only trying to trap the French government and provoke an English inspired war.⁵⁷ The followers of Jefferson had grown steadily and their cause gained or lost prestige in proportion as the French government was successful in its attempts to credit the Federalist administration with pro-British and war-mongering tendencies. The spirit of the French Revolution was linked with the Republicans' cause, and the Federalists were viewed as representatives of vested interests and confirmed opponents of democracy. It may be that most Federalists were as sincere in their fear of French aggression as the Republicans were hard put to explain the piratical acts of the French government against American shipping. Consequently, when the Adams' administration with Hamilton's great influence in the background began to gird the nation for war, the vicious attacks on its policies and measures by such Republican partisans as Callender, Dr. Thomas Priestly, Collot, and Volney, all of whom were foreigners,⁵⁸ caused the government to seek to protect itself. It could be that Judge Chase, during the early stages of the general reactions against the Alien and Sedition laws, uttered the true feeling of the Federalists when he said:

All governments, which I have ever heard or read of, punish libels against themselves. If a man attempts to destroy the confidence of the people in their officers, their Supreme magistrate, and their legislature, he effectually

57 Ibid., 212-213.

58 Avery, 221.

saps the foundations of the government.⁵⁹

As for the Republicans, their general opposition to the administration, its obnoxious laws and methods of enforcing them was intensified as never before.⁶⁰ In many instances the Federalists, while trying persons under the Alien and Sedition laws, dropped all pretenses of fair trials. In the trials under the Sedition act, local juries were often summoned and only Federalists were permitted to serve.⁶¹ Republican editors were convicted and sentenced.⁶² However, the ranks of the followers of Jefferson swelled and the attacks by the writers of the day continued with unabated fury. It must be noted that the Federalists were not without their editorial champions, among the most prominent of whom was William Corbett, who wrote under the pen name of "Peter Porcupine" and published his writings in the Porcupine Gazette. He viciously attacked the character of the Republican leader, Jefferson. He criticized everything about Jefferson's opposition to the Constitution and Hamilton, to his religious beliefs.⁶³ During this period of profuse editorial exchanges, one of the most able writers, agitators, and scandal-mongers enlisted in the Republicans' cause was James Thomson Callender, a political refugee from Scotland.⁶⁴ So intimately connected with the Republicans' cause was Callender that he received personal subsidies from Jefferson, whom he seemed to have literally worshiped.⁶⁵

59 Wharton, State Trials, 659.

60 Bassett, 263.

61 Ibid.

62 Avery, 226.

63 William Corbett, Porcupine's Works, Crown Hall and Mitre, London, 1801, XII, 99-213.

64 James Callender, Worthington C. Ford, Editor, Thomas Jefferson and James Thomson Callender, Historical Printing Club, Brooklyn, 1897, 1.

65 Ibid. 5-7.

Aside from the intensification of party hatreds and the political ill-fortune reaped by the Federalists as a result of their passage and uneven-handed enforcement of oppressive measures, another important ingredient of this embryonic political revolution was cast into the seething cauldron of men, ideas and measures. Historians have noted this development as the first extreme and positive constitutional assertion of the doctrine of state rights.⁶⁶ The doctrine found expression in the Virginia and Kentucky resolutions written by Madison and Jefferson respectively. As late as 1831 Madison declared that his Virginia resolutions were designed for political effect only.⁶⁷ Jefferson had said much earlier that he had intended the doctrine set down in the Kentucky resolutions to be employed by the states as a threat, acting within an area prescribed by prudence, to be held over the head of an oppressive government.⁶⁸ However, the resolutions reflect very lucidly the particularist inclinations of the Republican party leaders, the widespread disagreement over the nature of the union, the varied views as to the proper construction of the Constitution, and the fact that the Herculean tasks of nationalization lay ahead and not behind. In the first of the nine Kentucky resolutions, Jefferson, endeavoring to obstruct the Federalist program of consolidation, entrusted to the states the power to judge for themselves when the national government had exceeded the limits laid down in the Constitution. In the first resolution

66 Morison, 221.

67 Madison's Writings, IV, 357-358.

68 Jefferson, VII, 228.

of the Kentucky set Jefferson wrote:

Resolved that several states composing the United States of America, are not united on the principle of unlimited submission to their general government; but by that compact under the style and title of a Constitution for the United States and of amendments thereto, they constituted a general government for special purposes, delegated to that government certain definite powers, reserving each state to itself, the residuary of right to their own self-government; and whensoever the general government assumes undelegated powers, its acts are unauthoritative, void and of no force: that to this compact each state acceded as a state, and is an integral party, its co-states forming, as to itself the other party: that the government created by this compact was not made the exclusive or final judge of the extent of the powers delegated to itself; since that would have made its discretion, and not the Constitution, the measure of its powers; but that as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself as well of infractions as of the mode and measure of redress.⁶⁹

Thus spoke a man whose name has become a symbol for American democracy. How difficult of comprehension are his views as to the nature of the union to Americans of today. Yet in 1800 he was the leader of the party that was to control the national administration from the end of the Adams' term in 1801 down to the election of the Harrison-Tyler combination. The authors of the Kentucky and Virginia resolutions were to take over the executive office and hold it for 16 years. In 1800 Madison and Jefferson argued that the general government was only the instrument or agency of a compact formed by sovereign states. If Madison, who was the foremost authority on the

69 William McDonald, Editor, Documentary Source Book in American History, 1606-1898, Macmillan, New York, 1908, 268.

proceedings of the Convention at Philadelphia that framed the Constitution, and who has been hailed as the "Father of the Constitution", conceived the union to be only a compact between states, it can hardly be doubted that the accomplishments of John Marshall on behalf of consolidation or centralization were enough to tax the talents of genius and the courage of the fearless. The theories and exertions of Hayne, Rhett, Calhoun and Jefferson Davis should not so readily provoke the student's censure. It cannot be validly asserted that Calhoun's theory of nullification flowed directly and logically from Jefferson's Kentucky resolutions.⁷⁰ It does seem tenable, however, to conclude that the germ of nullification stemmed from the intense individualism of Thomas Jefferson, and was extended and cultivated successively by Randolph, Calhoun, Jefferson Davis and the secessionists. It was finally destroyed on the battlefields of the Civil War. John Marshall allied himself with the forces of nationalization rather than with the advocates of states' rights, and for thirty-four years through his great constitutional decisions exercised a lasting influence on American political life. It remained for Abraham Lincoln to complete the mission.

In addition to the widespread opposition to the domestic and foreign policies of the Federalist party, the growth of the Republican party under Jefferson, and the popular aversion to the moneyed interests represented in the Federalist ranks. There were personal cleavages between many of the Federalist leaders. The differences between Hamilton and John Adams have

70 A section of the Kentucky resolutions contained a passage asserting nullification which had been struck out. It is not known positively that the passage was the product of Jefferson's pen. Bassett, 268.

been mentioned. In 1800 Hamilton accepted Adams as the enevitable candidate of the Federalists, since Jay would not run and Washington and Henry were dead. After accepting Adams as the party's candidate,

Hamilton embarked on a course of petty intrigue similar to those of 1788 and 1796. To discredit Adams with his own party, Hamilton wrote a long dissertation to prove Adams' unfitness for the highest office. It was intended that this document should be passed from hand to hand among the leaders of the party. But the Republicans secured a copy and published it far and wide.⁷¹

The elections of 1800 were tense with the significance of the decisions which the voters were making. Many rumors were being circulated as to the plans and projects which the Federalists had devised to defeat the obvious preference of the people for the Republican party. The report was circulated that the Federalists were not going to permit any elections and intended to force the Presidency upon John Marshall.⁷² However, the Republicans did not have justifiable cause for the alarm which they showed. Hamilton, probably the most distinguished Federalist of them all, was working in the interests of the Republicans by his campaign against Adams. The election of 1800 resulted in a tie between Jefferson and Burr, the Republican candidates. The Constitution provided that in case of a tie vote for the President, the

⁷¹ Channing, 155-156.

⁷² Bassett, 292. There is evidence that the Republicans had formed a plan to surround Washington with a military force in order to guarantee a fair election. The idea was that the Republicans, if necessary, would take over the government by force and hold it until such time as a new constitutional convention might be called by Jefferson and Burr, the Republican candidates. Monroe, then governor of Virginia, expressed anxiousness lest he fail to carry out his assignment. Jefferson, Writings, VII, 491. James Monroe, Writings of James Monroe, G.P. Putnam's Sons, New York, 1898-1903, III, 256-258.

House of Representatives should make the choice. Since the Federalists in 1800 were so numerous in the House, they could virtually determine the choice between Jefferson and Burr. The latter was a disreputable but competent New York politician.⁷³ Hamilton's preference for Jefferson as the lesser of the two evils went a long way in deciding the ultimate choice for the Presidency. In a letter to Bayard on January 16, 1800, Hamilton wrote:

He [Burr] will never choose to lean on good men, because he knows that they will never support his bad projects, but instead of this he will endeavor to disorganize both parties, and to form out of them a third, composed of men fitted by their character to be conspirators and instruments of such projects. Besides that really, the force of Mr. Burr's understanding is much overrated. He is far more cunning than wise, far more dexterous than able. In my opinion, he is inferior in real ability to Jefferson.⁷⁴

Hamilton's counsel prevailed. Bayard and three of his Federalist friends⁷⁵ turned in blank ballots on the thirty-sixth ballot in the House and Jefferson was chosen president, "...without getting a single Federalist ballot in his favor."⁷⁶

The election of Jefferson brought the downfall of the Federalists. Few students, if any, would deny that the Federalists had not served a vital purpose in the history of the United States. John Adams many years later wrote with no embarrassment of the services he had rendered his country as the Federalist President. Adams wrote:

⁷³ Channing, 156.

⁷⁴ John C. Hamilton, Editor, The Works of Alexander Hamilton, Charles S. Francis and Co., New York, VI, 422-423.

⁷⁵ Bassett, 293.

⁷⁶ Schouler, VI, 496.

I left my country in peace and harmony with all the world, and after all my 'extravagant expenses' and 'wanton waste of public money', I left navy yards, fortifications, frigates, timbers, naval stores, manufactures of cannon and arms, and a treasury full of five millions of dollars. This was all done step by step, against perpetual oppositions, clamours and reproaches, such as no other President ever had to encounter and with a more feeble, divided, and incapable support that has ever fallen to the lot of any administration before or since. For this I was turned out of office, degraded and disgraced by my country; and I was glad of it.⁷⁷

In spite of the services performed by the Federalists, the Republican victory in 1800 was general and decisive. The response to the principles of democracy did not come from the agricultural South and West only. The attraction to "Jeffersonian democracy" had extended into Federalist dominated New England.

In Massachusetts the vote for the Republican candidate for governor rose from 8000 in 1797 to over 17,000 in 1800. The Federalist majority in the legislature of Vermont was reduced in the election of 1800 from over 100 to 34. There was an enormous increase in electioneering and popular meetings. The vote for governor in Massachusetts increased over 80 percent in the years 1798-1800.⁷⁸

By voting in such large numbers and showing such a decided preference for Jefferson, his party and his principles,

American voters, strong in their faith in humanity and in human progress, would no

77 John Adams and John Quincy Adams, Adrienne Koch and William Pedan, Editors, The Selected Writings of John and John Quincy Adams, Alfred A. Knopf, New York, 1946, 190-191.

78 Muzzy, I, 196.

longer consent to place the government of a free people in the hands of those who believed in government by a minority.⁷⁹

Samuel E. Morison wrote the following of the Federalist defeat:

So passed into minority the party which had contained more talent and virtue, with less political common sense, than any of their successors. It had been their task to tame the wild forces set loose by the American Revolution, to integrate discordant elements, to lead an inchoate nation to enduring union. To a remarkable degree they succeeded. But their chosen basis, an oligarchy of wealth and talent, was not sufficiently broad and deep. Their patience and vision were not great enough for their task. Their old-world precepts of vigour, energy, and suppression had become fixed ideas, enclosing them in a network of delusion that set them in antagonism to deep-rooted popular prejudices; and expanding forces⁸⁰ of American life enveloped and overwhelmed them.

Some Americans in 1800 did not know that the victory in the Revolution, the adoption of the Constitution, and the evasion of war with France had not completed their independence. Indeed, the government had only been launched. Its problems were to multiply with the increase in population, westward expansion, commercial and industrial development, and simply with time. The tasks of unification which lay ahead were difficult. In 1800 America was a nation in spirit only. The economic, cultural, social and religious distinctions between the individual states, between the Middle States and Southern States, and between the seaboard states and the trans-Appalachian frontier territory were deeply chiseled marks of diversity. The works of Marshall, Jackson, and Lincoln in distilling order out of

⁷⁹ Channing, 161.

⁸⁰ Morison, 225.

disorder and paving the highway to American greatness could hardly have been foreseen in 1800.

In February, 1801 John Marshall took his place as Chief Justice of the Supreme Court of the United States. Almost two months later Thomas Jefferson strode in a simple, unaffected manner from his lodging in the wilderness that was Washington to the unfinished capitol building where he was to be inaugurated. The political views of these two men as to the mission, functions and powers of the central government were diametrical opposites. Jefferson ascended to the President's seat as the champion of a popular, vigorous and growing majority. Marshall, at the head of the federal judiciary, was to preside over what was then the weakest and least influential branch of the national machinery. While the principles of "Jeffersonian democracy" as they affected the liberty and freedom of the individual were to grow and constitute an essential cornerstone in support of the American democratic concept, Jefferson's beliefs or theories as to the nature and power of the general government were doomed to destruction. Among the agents of their destruction were the Supreme Court, Webster, Jackson, and Lincoln. The Civil War effected the ultimate triumph of nationalism over state rights. In 1801 with Jefferson in the President's chair, the odds were decidedly against the increase of centralization. Marshall's political acumen, logic and courage overcame the odds, and as Chief Justice he "created" constitutional law in support of his nationalist convictions. The three succeeding chapters of this study will be devoted to an examination of three of Marshall's constitutional decisions which have so immeasurably influenced the formation, growth and operation of many

American political principles and institutions.

CHAPTER III

MARBURY VS. MADISON

In the first of the two preceding chapters an effort has been made to bring into view the men, events and influences which formed and deepened John Marshall's political ideas and convictions. Having treated the genesis and nature of his nationalism, the second chapter was devoted to a brief and general description of the political, economic, cultural, social and geographic scenes to which Marshall began applying his doctrines through opinions from the bench of the Supreme Court. In this and two subsequent chapters the plan is to treat three outstanding cases on constitutional law, from which have come principles of constitutional law which have exercised a strong and lasting influence on the American political fabric. It is through his enunciation of these principles that Marshall has achieved his towering legal and historical stature. Nicholas M. Butler, the late president - emeritus of Columbia University, expressed the opinion of many students of American history and government when he wrote that: "The building of the Government of the United States as we know it would have been quite impossible without John Marshall."¹

After examining many of the important cases which came before the Court during Marshall's long term as Chief Justice, it is not difficult

¹ The Lord Cragmyle, John Marshall in Diplomacy and in Law, Charles Scribner's Sons, New York, 1933, Preface, 6.

to choose those cases in the field of constitutional law which are of transcending importance. An able and distinguished writer on American constitutional law, James Bradley Thayer, has divided Marshall's constitutional opinions into three classes.² The first class of opinions deals with the reach of the federal government and its relation to the states. The second class treats the specific restraints and limitations which the Constitution imposes upon the states. The third class sets forth the general theory or principles of American constitutional law. Writers are in general agreement as to the relative importance of Marshall's outstanding opinions. While the following statement by Dr. Butler would probably be regarded as somewhat generous by many, few students would challenge his choice of cases.

The expositions of the Constitution contained in the four great cases of *Marbury vs. Madison* (1803), *McCulloch vs. Maryland* (1819), *Cohen vs. Virginia* (1824) are hardly less important than the work of the Constitutional Convention itself. The *Dartmouth College* case (1819) had, as Marshall said in delivering the opinion of the court, both magnitude and delicacy. The part which it played in the history of the United States is well known.³

The three cases selected for discussion in this study have been taken from the three general classes of constitutional opinions as conceived by Thayer. From that class of opinions which treats of the scope of the federal government and its relations to the states, the case of *McCulloch*

2 Dillon, quoting Thayer, I, 234.

3 Craigmyle, Preface, 7.

vs. Maryland has been selected. The case which seems to furnish a most thorough exposition of the specific constitutional restraints and limitations placed upon the states is that of Dartmouth College vs. Woodward. For the case which sets forth the transcending principle of American constitutionalism, one is compelled to use the case of Marbury vs. Madison. It is the latter case which will be discussed in this chapter.

The great importance of the case of Marbury vs. Madison lies in the fact that it was the first case in which the right of the Supreme Court to invalidate an act of Congress which violated the Constitution was asserted from the bench of the nation's highest tribunal.⁴ The principle of judicial review has since become a cardinal feature of the American constitutional system. It can hardly be safely maintained by any careful student of American and English constitutionalism that the doctrine expounded by Marshall on February 24, 1803,⁵ stemmed solely from the litigation in the case of Marbury vs. Madison.⁶ Some consideration of the historical background to the principle of judicial review will be given later in this section. It seems appropriate to consider first the circumstances which provided both the underlying and immediate bases for the specific litigation in the case under discussion. A consideration of the chain of political conditions and events before 1801 which brought this case before the Supreme Court is essential to a full comprehension of the points and ques-

4 Ambrose Duskow, Historic Opinion of the United States Supreme Court, The Vanguard Press, New York, 1935, 4.

5 Avery, VII, 372.

6 Andrew Cunningham McLaughlin, The Court, the Constitution, and Parties, The University of Chicago Press, Chicago, 1912, 10.

tions at issue.⁷ Joseph Cotton Jr. expressed this view when he wrote that, "...the story of the political troubles that gave rise to the case is not without interest or point in a study of Marshall's career".⁸

It may be safely and generally said that the case of Marbury vs. Madison was the direct outgrowth of the political struggle between the party founded by Jefferson and the Hamiltonian Federalists.⁹ In the preceding chapter it has been noted that the division of the country into two political camps began back during the Washington administration. Some note was also taken of the breach between Hamilton and Jefferson over the bank issues, the difficulties over the Jay Treaty, the opposition to Hamilton's broad construction of the Constitution, and the election of 1800. It was this election that placed Thomas Jefferson in the White House and set the stage for the eventual removal of almost all the defeated Federalists from the executive and legislative branches of the federal government.¹⁰ However, it was obvious to everyone that the third branch of the government had not been won. This department was the federal judiciary; and it was this branch of the Federalist machinery which had been most obnoxious to the embittered Republicans, who were resolved to demolish every last vestige of perverse federalism.¹¹ As Jefferson took office in 1801, he was not alone in his discomfort at the security with

7 Doskow, 3.

8 Joseph M. Cotton, Jr., The Constitutional Decisions of John Marshall, G. P. Putnam's Sons, New York, 1905, II, 3.

9 Ibid.

10 Morison and Commager, 289.

11 Beveridge, III, 1.

which the Federalists, through political maneuvering, had entrenched themselves in the only branch of the government where they were safe from Republican ballots. After surveying the Federalist judicial fortress, Jefferson said: "The Federalists have retired into the judiciary as a stronghold, and from that battery all the works of republicanism are to be battered down."¹²

The Republican party rode into power in 1800 on the wings of overwhelming popular approval. In tracing the genesis of the popular distaste for the national Federalist judiciary, some enlightenment might be gained from a discussion of the widespread opposition to the courts during the years after the formation of the government under the Articles of Confederation. The troubles arose in many instances over the collection of public and private debts. Many of the state legislatures passed laws in an attempt to relieve the debtors from their obligations. The attempt by the British and American property owners to secure payment of debt was naturally carried into the courts.¹³ Channing wrote of the early friction in Massachusetts resulting in Shay's Rebellion that:

The first indications of trouble in Massachusetts were the attempts of mobs and riotous assemblies to prevent the opening of the courts of law. The movement was not confined to any one locality. The people threatened the judges at Groton...at Tauton ...and at Worcester....¹⁴

The factors in the widespread objections of the masses to the work of the

¹² Ibid.

¹³ Hicks, 193.

¹⁴ Channing, III, 485.

courts during the years following the Revolution have a relation to the present topic which is perhaps too distant to merit more than passing consideration here. However, more than slight significance may be attached to the fact that much of the early unpopularity of the judiciary was due to the obligation of the courts to enforce the claims of the loyalist merchants and property holders on American debtors and holders of confiscated property, in accordance with the terms of the Treaty with England. Morison wrote:

One clear obligation placed on the thirteen states by the peace treaty was to open their courts freely to British subjects seeking to recover their prewar debts. There was no doubt that this article was violated both in letter and spirit. Virginia...led the way in passing laws hampering the recovery of British debts. John Jay induced Congress to send a circular letter to the States adverting strongly (as Washington did also) on their breach of public faith, and requesting the repeal of their illegal acts. Most of them had complied by 1789, when the Constitution superseded all state laws contrary to treaty obligations and opened the new federal judiciary to British litigants. Thereafter the recovery of British debts was a matter of judicial process, and no impediment was imposed....¹⁵

It is safe to conclude that the enforcement of the treaty in the federal courts did not provoke the praise of the agricultural or debtor people. Charged with the enforcement of the national laws and treaties, it is not surprising that the federal courts were unfavorably regarded by many Americans. Opposition came equally from those who felt that the English and loyalists had no justified claims and those who were fearful of

¹⁵ Morison, I, 58-59.

centralization. Charles Beard points out that the failure of the framers to explicitly state the principle of judicial review was not due to their fear of popular disapproval of the principle. Beard does hold, however, that the framers were so conscious of the general objections which the people would have to a system of subordinate federal courts that they specifically provided for only the Supreme Court.¹⁶ Congress, after ratification had been secured, was to create such lower courts as might be needed. It seems clear then that the general unpopularity of the national courts was not the exclusive product of the political events of the Adams administration.

A second factor which deserves some attention in connection with the unpopular status of the national judiciary before 1801, has received treatment by distinguished writers. It stemmed from the many difficulties which arose over the employment by the national judiciary of the English common law to enforce Washington's Proclamation of Neutrality and the Treaty of Peace with England.¹⁷ The Chief Justice of the United States, John Jay, charged a grand jury at Richmond on May 22, 1793, and approved the use of the English common law. He approved its use where there was no federal legislation as a guide in adjudicating cases involving crimes against the United States.¹⁸ In July of the same year, Justice James Wilson, a leading member of the Constitutional Convention and an eminent member of the Pennsylvania bar, supported the use of the English common law in his charge

16 Charles A. Beard, "The Supreme Court - Usurper or Grantee", Political Science Monthly, 1912, XXVII, 10.

17 Beveridge, III, 22-23.

18 John Jay, Henry P. Johnston, Editor, The Correspondence and Public Papers of John Jay, G.P. Putnam's Sons, New York, 1895, III, 479.

to a grand jury at Philadelphia:

If the qualities of the parent may be expected in the offspring, the common law, one of the noblest births of all time, may be pronounced the wisest of all laws. It might be amusing and instructive, but at this time it would be improper to sketch the general outline of the system through the government of the Saxons down to the conquest of the Normans. Suffice it to observe, and the observation is important, that the common law as now received in America, bears, in its Principles and in many of its more minute particulars a stronger and fairer resemblance to the common law as it was improved under the former, than to that law as it was disfigured under the latter.¹⁹

It can be readily understood that the use of the English common law by men of the Federalist faction in punishing the violaters, mainly Republicans, of the national treaties and laws would only accent the hostility of the followers of Jefferson to both the courts and the common law. Beveridge treats the cases of Gideon Henfield, tried for violating the Neutrality Act, and Joseph Ravara, a consul for Genoa, who was indicted for writing threatening letters to the British Minister and others in an attempt to extort money.²⁰ There was not a single national statute which could be applied to either case.²¹ Chief Justice John Jay and District Judge Peters held that Ravara was punishable under the common law of England. He was tried and convicted.²² It was James Wilson who instructed the grand jury that Henfield was punishable under the common law,²³ and the trial jury

19 Wharton, 60-61.

20 Beveridge, III, 24-25.

21 Ibid., 25.

22 Wharton, 90-92.

23 Ibid., 59-66.

was also instructed that the common law was applicable.²⁴ The jury, however, refused to convict Henfield. Marshall in reporting the case, approved the extended and enthusiastic approbation given the verdict by the people. It is to Marshall's credit that he wrote reliably in defense of the popular opposition to the federal judiciary's attempt to impose the English system on the people.

It was universally asked, what law had been offended, and under what statute was the indictment supported. Were the American people already prepared to give a proclamation to the force of a legislative act, and to subject themselves to the will of the executive? But if they were already sunk to such a state of degradation, were they to be punished for violating a proclamation which had not been published when the offense was committed, if indeed it could be termed an offense to engaged with France, combating for liberty against the combined despots of Europe.²⁵

It is not difficult to detect the early frictions. Beveridge notes carefully that in a subtle but clear and positive fashion the federal judiciary was becoming the instrument of Federalist political and foreign policies and measures.

In this wise the political passions were made to strengthen the general protest against riveting the common law of England upon the American people by judicial fiat and without authorization by the National Legislature.²⁶

24 Ibid., 85. Wharton in a footnote reduces the charge to the trial jury to three main points. He states the second point: "Though there has been no exercise of the power conferred upon Congress by the Constitution to define and punish offenses against the laws of nations, the federal judiciary has jurisdiction of an offense against the laws of nations and may proceed to punish the offender according to the forms of the common law." Wharton, 85.

25 Marshall, Life of Washington, II, 273-274.

26 Beveridge, III, 26.

The assumption by the federal judiciary of this power to call American citizens before the national courts, indict and punish them, in accordance with laws Congress had not passed and unnamed provisions of the Constitution, threatened the very lives and liberties of the American people.²⁷ It was therefore not without reason that Republican toasts in the Federalist stronghold of Boston depreciated the use of the common law and looked to the Republican Congress of 1801 for the passage of statutes which would expel, "...this engine of oppression from America."²⁸

The attack on the Federalist Judiciary in 1801, which precipitated the case of *Marbury vs. Madison*, was also rooted in another aspect of the national judiciary's conduct. The reputation which the federal courts acquired as a result of their prosecutions under the obnoxious Alien and Sedition laws was very unpopular. Almost as alarming as the laws themselves was the highhanded, partisan and abusive enforcement of the laws in the federal courts by Federalist judges.²⁹ The first important conviction secured by the Federalists under the Sedition Law, the more abusive of the two statutes, was that of Matthew Lyon a Representative from Vermont. In attacking the conduct of President Adams, Lyon had charged that Adams was pompous, avaricious and possessed with an insatiable greed for power. Francis Wharton's invaluable source book of state trials during the administrations of Washington and Adams contains the libellous statements which

27 Ibid., 23.

28 Charles Warren, *The History of the Federal Bar*, Little, Brown, and Co., Boston, 1911, 225-227. Warren quotes *The Columbian Centinel* of July 11, 1801.

29 Edward S. Corwin, *John Marshall and the Constitution*, Yale University Press, New Haven, 1919, 57.

statements which were credited to Lyon. The Congressman from Vermont was alleged to have said:

...whenever I shall, on the part of the Executive, see every consideration of the public welfare swallowed up in a continual grasp for power in an unbounded thirst for ridiculous pomp, foolish adulation and selfish avarice; ...I shall not be their humble advocate.³⁰

Justice William Paterson and District Judge Hitchcock presided over the case.³¹ Lyon maintained that the jury was selected from his enemies; consequently, he could not expect a fair trial.³² However, The New Spectator, a paper which Wharton reports was under Hamilton's control, and therefore thoroughly Federalist, denied the accuracy of the defendant's charge.³³ Justice Paterson's charge to the jury was not objectionably partisan. The jury returned a verdict of guilty; and the court sentenced Lyon to four months imprisonment, fined him one thousand dollars, and required him to pay the cost of court. Lyon was confined to a filthy jail, and treated as a common criminal by the Federalist United States Marshall, Jabez G. Fitch.³⁴ The general reaction to this treatment of the Republican legislator, notorious though he was,³⁵ was indeed bitter and intense. Jefferson wrote to John Tayler that: "I know not which mortifies me most, that I should fear to write what I think, or my country bear such a state of things."³⁶ The editor of the Vermont Gazette, printed an article lamenting the

30 Wharton, 333.

31 Beveridge, III, 31.

32 Wharton, 336.

33 Ibid.

34 Ibid., 339-341.

35 Beveridge, III, 30.

36 Ibid., 31.

Federalists' commission of Lyon to the custody of the "savage" Marshall Fitch. He was arrested and tried under the Sedition law. Justice Paterson presided over this case and ruled as inadmissible much of the evidence upon which the editor, Anthony Haswell, based his case.³⁷ The jury found him guilty and he was sentenced to two months imprisonment and fined two hundred dollars.³⁸

The individual justice who brought the largest share of disgrace upon the federal courts was Samuel Chase of the Supreme Court. He provided the Republicans with their most conclusive evidences of the Federalist abuses of justice and democracy. Chase presided successively at the trials of Thomas Cooper for sedition, John Fries, accused of treason, and James Thompson Callender, tried for sedition.³⁹ Corwin wrote of these trials that:

On each of the two latter occasions the defendant's counsel, charging 'oppressive conduct' on the part of the presiding judge, had thrown up their briefs and rushed from the courtroom. In 1800 there were few Republicans who did not regard Chase as 'bloody Jeffrey's of America.'⁴⁰

A shorthand account of the impeachment trial of Samuel Chase which the Republicans conducted in May of 1805 contains the articles of impeachment and brings to light the improper conduct of Chase. One of the eight articles of impeachment charged that Justice Chase:

...disregarding the duties and dignity of his official character did...pervert his official right and duty to address the jury then and there assembled on the matters coming within the province of the said jury, for purpose of delivering to

³⁷ Wharton, 685.

³⁸ Ibid., 685-686.

³⁹ Corwin, Marshall and the Constitution, 57.

⁴⁰ Ibid.

the said jury an intemperate and inflammatory political harangue, with intent to excite the fears and resentment of said grand jury, and of the good people of Maryland.⁴¹

From the same work has come a statement taken from one of Chase's partisan charges to a jury in which he concerned himself with certain political questions saying:

The change of the state constitution by allowing universal suffrage, will in my opinion certainly and rapidly destroy all protection to property, and all security to personal liberty; and our republican constitution will sink into a mobocracy, the worst of all possible governments.⁴²

Chase in a charge to a Maryland jury took the time and occasion to predict that the repeal of the Federalist Judiciary Act of 1801 would, "...take away all security for property and personal liberty".⁴³ The Justice was perhaps the worst of the Federalist judges, many others took the liberty to deliver addresses on irrelevant matters of religion, morality or politics. Beveridge includes a statement from an individual who was in the courtroom during a United States Circuit Court trial before Justice Paterson. The observer said of Paterson's charge that:

The law was laid down in a masterly manner: Politics were set in their true light by holding up the Jacobins (Republicans) as the disorganizers of our happy country, and the only instruments of introducing discontent and dissatisfaction among the well meaning part of the community. Religion and morality were pleasingly inculcated and enforced

41 Samuel H. Smith and Thomas Lloyd, Recorders, Trial of Samuel Chase, Printed for Samuel H. Smith, Washington City, 1805, 93-94.

42 Ibid., 95.

43 Ibid.

as being necessary to good government, good order,
and good laws; for when the righteous (Federalists)
are in authority the people rejoice...⁴⁴

It is not difficult to comprehend, partly at least, the intense hostility of the Republicans to the judiciary. The choice of persons for jurors, as has been noted in a preceding chapter, was made by the Federalists on a highly partisan basis.⁴⁵ The officials in the national judiciary were almost invariably Federalist.⁴⁶ These officials selected for jury service only those persons who were of similar political views. "So it was that the juries were nothing more than machines that registered the will, opinion or even inclination of the National judges and the United States District Attorneys."⁴⁷ McMaster asserts strongly that under the Federalist jury system, trial by jury was not prevalent.⁴⁸ It is not surprising then that Jefferson, earnestly though illogically, sought to place the ultimate interpretation of the Constitution and the limits of national authority in hands other than those of the national judiciary. It must be clearly seen that in the spring of 1801, when the newly elected Republicans in both the state and national governments launched their historic attack on the bulwark of federalism, the federal judiciary, the Federalists themselves, had not only laid the fire but had fanned the flames.⁴⁹ The Federalists' unwise passage of the Alien and Sedition laws resulted in curbs on the liberty of

44 Beveridge, III, 30.

45 Ibid.

46 Ibid., 29.

47 Ibid., 42.

48 John Bach McMaster, A History of the People of the United States, D. Appleton and Co., New York, 1888, II, 473.

49 Corwin, Marshall and the Judiciary, 57.

the press and freedom of speech of Americans. The Republicans' bitter feelings were incited at what they considered the insolent, oppressive and unjust enforcement of the statutes by highly partisan judges in state and national courts. The above factors combined with others, which stemmed from the Federalists' hostility to France and partiality toward England, provided the broad foundation for the Republicans' attack on the judiciary in 1801. These factors constitute the general, underlying, historical influences that produced the case of Marbury Vs. Madison.⁵⁰ The more immediate factors are to be found in the efforts of the lame-duck Federalist Congress and the defeated President in expanding the national judiciary, and the efforts of the newly elected Republicans to break the Federalist grasp on the national court system. Some attention must be accorded to these immediate factors at this point.

In his inaugural address on March 4, 1801, Jefferson promised in a somewhat casual manner that the organization of the national judiciary would present itself to the contemplation of Congress.⁵¹ Beveridge states that a more strongly worded passage written by Jefferson, in which he held that he as President had the power to decide whether or not an act violated the Constitution,⁵² was deleted because Jefferson thought that the Federalists would employ it to the disadvantage of his party.⁵³ In spite of the mild-

⁵⁰ Doskow, 3.

⁵¹ Jefferson, Works, IX, 321.

⁵² Beveridge, III, 52.

⁵³ Ibid., 52-53.

ness of the President's message, the Federalist leaders saw the handwriting on the wall. Fisher Ames, a devout Federalist, wrote to Rufus King on December 20, 1801 that the President had proclaimed the destruction of the revised judiciary and had committed himself to the exaltation of the states.⁵⁴ McMaster points out that many of the good and bad Federalist measures had been repealed, and only the judiciary remained to provoke the Republicans' sense of revenge.

During eight years they had longed for revenge, and having at last obtained power, they hurried on to take that kind of vengeance which is the lowest, the most despicable, the most unjustified of all, the vengeance inspired by political malice.⁵⁵

The trials of the Republican editors, the surrender of Nash, Williams and Fries to the British, and the appointment of many Federalist judges set off the Republican attack.⁵⁶

The attitude of the majority party toward the federal court system was reflected in a statement by Senator Jackson of Georgia. Jackson was speaking in a Senate debate over the judiciary on January 12, 1802. He said:

We (Republicans) have been asked if we are afraid of an Army of judges. For myself, I am more afraid of an army of judges, under the patronage of the President than of an army of soldiers. The former can do us more harm. They may deprive us of our liberties...Sir, it is said these evils will not happen. But what truth have we for the truth of the declaration? Have we not heard judges crying out through the land, sedition!⁵⁷

54 King, Life, Correspondence, and Speeches, IV, 40.

55 McMaster, III, 607.

56 Ibid.

57 Annals of Congress, 7th Congress - 1st Session, Column 47.

Jefferson had no intention of permitting the Federalist judges to go undisturbed. His distrust of the judiciary as it was constituted in March 1801 prompted him in the management of the Republican assault upon the courts.⁵⁸

Less than one month⁵⁹ before the expiration of the defeated Federalists' term, the Adams administration passed the Judiciary Act of 1801. It was this act which provided for the many judicial appointments which the Federalists enjoyed when Jefferson took office. The national court system in February 1801 existed under the Judiciary Act of 1789, which had been formed under the direction of Oliver Ellsworth. Mr. Justice Fields attributed the authorship of the Judiciary Act of 1789 to Ellsworth and goes further by saying that the act reflected the feelings of the framers of the Constitution as to the relationship between the state and federal courts.⁶⁰ Hannis Taylor, a writer in English and American constitutional history, is liberal in his praise of the author and the act of 1789. The Judiciary Act of 1789 provided for a Supreme Court of six justices and thirteen primary or District Courts divided into three Circuits.⁶¹ The District Courts, aside from having exclusive and original jurisdiction of certain crimes set down in the act, entertained all civil cases of admiralty and maritime jurisdiction under the national law. They also held concurrent jurisdiction with the several state courts and Circuit Courts in certain cases involving inter-

58 Andrew C. McLaughlin, A Constitutional History of The United States, D. Appleton-Century, New York, 1935, 289.

59 Ibid., 288.

60 Hannis Taylor, The Origin and Growth of the American Constitution, Houghton-Mifflin Co., Boston, 1911, 227.

61 Ibid., 226.

national law, cases tried at common law with the United States as plaintiff, and writs, exclusive of the state courts, against the consuls or vice-consuls.⁶²

The Circuit Courts under the act of 1789 enjoyed concurrent jurisdiction with the state courts in certain cases defined in the act or in offenses against the United States. The Republicans, in attacking the Federalists, charged them with pure political ambition. Historians, however, have admitted that while political ambition may have been an important factor, the act of 1789 contained many undesirable features. McLaughlin points out that Adams had recommended the repeal of the act in 1799.⁶³

Among the undesirable features of the act of 1789 was that provision which required the members of the Supreme Court to travel the circuit in a day when traveling was so taxing on the mind and body.⁶⁴ In addition to holding court in the circuits twice annually, the six Justices were to sit as the Supreme Court twice yearly in Washington.⁶⁵ Gouvenuer Morris wrote that under the court system as provided in the Judiciary Act of 1789, the President, "...in selecting a character must seek less the learning of a

62 Ibid., 226-227.

63 McLaughlin, Constitutional History, 288.

64 Ibid.

65 Beveridge, III, 55.

judge than the agility of a post boy".⁶⁶ On January 2, 1801 John Jay wrote to John Adams explaining his refusal to accept Adams' appointment of him as Chief Justice:

I left the bench perfectly convinced that under a system so defective it would not obtain the energy, weight, and dignity which are essential to affording due support to the national government, nor acquire the public confidence and respect which as the last resort of the justice of the nation it should possess.

Some of the members of the Congress which passed the act of 1789 felt that the system provided was not a good one. Many pointed to the fact that in many cases the Supreme Court Justices would sit as trial and appellate judges in the same case. Elbridge Gerry pointed to the tyranny in the system of national courts.⁶⁸ Samuel Livermore of New Hampshire saw in the system a serious threat to the judicial sovereignty of the state courts.⁶⁹ Senator William Maclay of Pennsylvania expressed the fear that the federal judiciary would actually destroy the Constitution.⁷⁰

66 McLaughlin, Constitutional History, 288. McMaster wrote: "No sooner does the court adjourn at Washington than the justices must throw a few clothes into a portmanteau, rush to the stage-office and go off north, east and south on their circuits. Not a moment is allowed for them to rest, for study, for the enjoyment of the blessings of home. They must hurry on from place to place, holding court one day here; another day there; sleeping half the night in a stagecoach and half in a tumbled down inn....And when the rains do descend,... and the justice is detained, what a picture is presented by the lawyers, clients, witnesses and jurors, fuming and grumbling while his Honor the judge holds fast to a seat of a coach as it flounders and lurches through the mud miles from the town, and long after the time appointed for the opening of Court! McMaster, III, 611.

67 Jay, Correspondence and Public Papers, IV, 285.

68 Annals of Congress, 1st Congress, 1st Session, 862.

69 Ibid., 852.

70 William Maclay, Edgar S. Maclay, Editor, Journal of William Maclay, D. Appleton & Co., New York, 1890, 98.

Senator James Jackson of Georgia, as a staunch Republican in 1802, favored the repeal of the act of 1801 and the reinstitution of the system as set up under the act of 1789. In 1789, however, Senator Jackson had felt that the Judiciary Act of 1789 would enable the national courts to "...harass the poor man".⁷¹ It seems safe to conclude that the repeal of the act of 1789 by the Federalists accomplished some good. The Judiciary Act of 1801 provided in several obvious and important respects a better federal court system. However, it is not sound to absolve Adams and his party of employing the expanded judicial system as a means of entrenching themselves in the national government and imposing Federalism on the Republicans.⁷²

The Judiciary Act of 1801 was passed on February 12. It provided for the reduction of the Supreme Court justices from six to five after the first vacancy and eliminated the work of the justices in the circuits. The act increased the number of District Courts and provided for sixteen Circuit Judges with corresponding Marshalls and Attorneys.⁷³ The newly created offices in the national judiciary were filled with loyal Federalists by the lame-duck Federalist Congress and John Adams. Edward Channing sympathetically and generously absolves Adams of political coniving against Jefferson. Channing believed that Adams was simply being responsive to

71 Annals of Congress, 1st Congress, 1st Session, 833-834.

72 Homer Carey Hockett, Political and Social Growth of the American People, Macmillan Co., New York, 1940, 374.

73 McLaughlin, Constitutional History, 288.

party pressures and the inclinations of a good heart.⁷⁴ The story has been circulated that Adams stayed up until midnight on March 3, 1801, signing commissions for Federal appointees.⁷⁵ The historian, Muzzey, wrote that:

In the closing months of his term, President Adams had sent over two hundred nominations to the Senate. This attempt to saddle on the incoming administration a host of Federal appointments⁷⁶ Jefferson considered to be positively indecent.

Jefferson took office with his mind made up to repeal the Judiciary Act of 1801.⁷⁷ It was he who in a very tactful statement gave the signal for the Republican assault upon the Federalist controlled national courts. The cue came in his message to Congress on December 8, 1801. After suggesting that Congress consider the entire national court system, particularly that part which had been recently set up by the Federalists, Jefferson gave evidence of the serious attention which he had given the subject. He continued:

...and that they the Congress may be able to judge of the proportion which the institution bears to the business it has to perform, I have caused to be procured from the several states and now lay before Congress, an exact statement of all the causes decided since the first establishment of the courts and those which were pending when additional judges were brought to their aid.⁷⁸

74 Channing, IV, 241.

75 Morison, I, 248.

76 Muzzey, I, 207.

77 McMaster, III, 607.

78 Ibid.

Senator Breckinridge of Kentucky took his cue from the President's statement. On January 4, 1802, the Senator notified the Senate that on the following Wednesday he would move for the order of the day on that part of the President's message which pertained to the national courts.⁷⁹ On the following Wednesday Breckinridge moved for the repeal of the Judiciary Act of 1801 and spoke at great length on the merits of his motion. The Senator based his argument on two points: first, "that the law was unnecessary and improper, and was so at its passage;" second, "that the courts and judges created by it can and ought to be abolished."⁸⁰ The debates which followed are of interest for their discussion of constitutional questions. Hardly any important aspects of the problems or considerations involved in the creation and abolition of judicial offices were left untouched. Those who supported the repeal of the act of 1801 admitted that legislation removing a judge from office would be unconstitutional; however, they maintained that there were no constitutional restraints or limitations on legislative abolition of the office.⁸¹ The Republicans reminded the Federalists that the Constitution imposed only three restraints on the legislature in the exercise of its control over the federal court system. These were: that there should be only one Supreme Court, that judges should hold their office during good behavior, and that the pay of the judges should not be diminished during their period of service.⁸²

79 Annals of Congress, 7th Congress, 1st Session, 21.

80 Ibid., 25.

81 McLaughlin, Constitutional History, 290.

82 United States Constitution, Article III, Section 1.

The Federalists maintained that the destruction of the lower courts would only serve to destroy the independence of the judiciary. Mason of Massachusetts spoke strongly but futilely on the inadvisability of subjecting the courts to the passions of the legislature.⁸³ The question of judicial review received the attention of some of the most able members of the Congress. After long and earnest debate, the issue finally came to a vote in March, 1802. The act which repealed the Judiciary Act of 1801 was passed by the Republican majority in Congress and signed by Jefferson. In addition to repealing the act of 1801, the Republicans reinstituted the court system as provided under the old act of 1789.⁸⁴ As a consequence of this action, many judges were left without offices. The Republicans failed to make any provision for the ousted Federalists. It has been noted that this was the only instance in American history when Congress failed to make some provision for judges whose offices it had abolished.⁸⁵ In April, 1802, the Republicans passed the Judiciary Act of 1802. The main differences between the courts under this system and those under the act of 1789 were: the Supreme Court sat only once annually, the circuits were reduced to six, and one Justice of the Supreme Court sat as a Judge in the Circuit Courts twice annually.⁸⁶ The limitation of the Supreme Court to one term annually was fiercely opposed by the Federalists.⁸⁷ Beveridge holds that

83 Annals of Congress, 7th Congress, 1st Session, 33.

84 McLaughlin, Constitutional History, 292.

85 Erik M. Erickson and David Nelson, American Constitutional History, W. W. Norton and Co., New York, 1933, 275.

86 Annals of Congress, 7th Congress, 1st Session, 1160.

87 Beveridge, III, 94.

the Republicans abolished the terms of the Court as provided under the act of 1801 so as to prevent the Court from holding its regular June session and declaring the Republican repeal of the Judiciary Act of 1801 unconstitutional.⁸⁸

Under the Federalist act the Court held sessions twice every twelve months in December and June. The Republicans provided for one annual session of the Court which was to begin on the second Monday in February.⁸⁹ McLaughlin concedes that it may have been the intention of the Republicans to prevent Marshall from immediately nullifying their act of 1802, which led them to cut out the June session of the Court. He emphasizes, however, that the chief objection raised by the Federalists was concerned with the congressional impropriety of limiting the Court to one session per year.⁹⁰ The Republicans' action forced Marshall and his Associate Justices to wait nine months after April, 1802 before they could act or speak on the great questions inherent in the Republican assault upon the Judiciary.⁹¹ It is not of commanding importance to this study to treat the reactions which reverberated throughout the country following the passage of the acts discussed above. Perhaps it will be adequate for all purposes to state that both the opposition to and support of the Republicans' measures were positive, strongly partisan and often vehement.

The discussion of the Judiciary Act of 1802 brings this project down to the immediate facts and events which brought the case of Marbury Vs.

88 Ibid., 95.

89 Ibid.

90 McLaughlin, Constitutional History, 293.

91 Ibid.

Madison before the Supreme Court. The serious questions which stemmed from the bitter Republican and Federalist party strife in the late eighteenth century had received no convincing and final answers. The assault by the Republicans upon the Federalists' judicial fortress had brought an important issue into the open. It was obvious that the nation could not develop in an orderly manner until a generally acceptable answer was found to the question as to who possessed the authority to judge with finality between what is the law of the land and what is not. It is for the answer to that question that students of American constitutional history and constitutional law turn to Marshall's historic decision in the case of *Marbury Vs. Madison*.

The immediate facts in the case of *Marbury Vs. Madison* stem from the appointment by Adams of justices of the peace for the District of Columbia.⁹² The bill creating these offices came to Adams about one week before the expiration of his term.⁹³ In this act of Congress Adams was authorized to appoint, "...such a number of discreet persons to be justices of the peace as the President should think expedient. Adams immediately nominated the unconscionable number of forty-two persons, and the nominations were immediately confirmed by the still Federalist Senate".⁹⁴ While the Senate had properly approved all the Adams appointees and all the commissions had been properly signed and sealed,⁹⁵ many had

92 Avery, VII, 372.

93 Ibid.

94 Carl Brent Swisher, The Growth of Constitutional Power, University of Chicago Press, Chicago, 1946, 55.

95 Annals of Congress, 7th Congress, 1st Session, 2245.

not been delivered when Jefferson and his Secretary of State, James Madison, took office in March 1801. Jefferson ordered Madison to issue the commissions of twenty-five of the appointees and to withhold seventeen.⁹⁶ Among the seventeen undelivered commissions was that of William Marbury, who applied to the Supreme Court for a Writ of Mandamus against Madison compelling him to deliver his properly executed commission.⁹⁷ Marbury brought the suit into court on the basis of the 13th Section of the Judiciary Act of 1789, which gave the Supreme Court authority to issue the writ of mandamus, "...in cases warranted by the principles and usages of law...to persons holding office under the authority of the United States".⁹⁸ The Supreme Court in December, 1801, assumed jurisdiction of the case and issued a rule to Madison asking him to show why he should not be issued a writ of mandamus at the next term of the Court.⁹⁹ The Supreme Court did not hold its June session in 1802 as it had anticipated. That session, as has been noted, was abolished. When the Court opened its term on the second Monday in February 1803, Marbury's application before the Court was still pending.

As the Court opened its February, 1803 session the Republicans in Congress were continuing their assault upon the Federalist controlled national courts. Impeachment proceedings against several national judges were beyond the stage of contemplation. Such proceedings were instituted

96 Beveridge, III, 110.

97 Corwin, Marshall on the Constitution, 64.

98 Ibid.

99 Beveridge, III, 111.

by the Republicans against John Pickering less than three weeks after Marshall gave the opinion of the Court in the case of Marbury vs.

Madison.¹⁰⁰ Nicholson and Randolph, the Republican standard-bearers in the House, notified the Senate on March 4, 1803, that in due time the House would exhibit charges against John Pickering, accusing him of high crimes and misdemeanors.¹⁰¹ Marshall and the Associate-Justices could not have been unconscious of the hostile attitude with which the legislative and executive branches regarded the judiciary.¹⁰² The pressure on the Court was intense;¹⁰³ and the well known political inclinations of the members of the Court led to the general feeling that the Court would decide the case in favor of Marbury. Beveridge casts some light on the tenseness which characterized the Court's entertainment of Marbury's application against Madison.

...the Republicans openly threatened to oust Marshall and his Federalist associates in case the court decided Marbury vs. Madison as the Republicans expected it would. Everybody apparently, except Marshall and the Associate-Justices, thought that the case would be decided in Marbury's favor. It was upon this supposition that the Republican threats of impeachment were made.¹⁰⁴

Many Republicans conceived the Marbury case to be a Federalist party maneuver, and they threatened to meet the issue by impeachment. Beveridge

100 Journal of the Senate of the United States in Cases of Impeachment, William Duane and Son, Washington City, 1805, 35.

101 Ibid.

102 Corwin, Marshall and The Constitution, 55-56.

103 Ibid., 56-57.

104 Beveridge, III, 112.

felt that Marshall had good cause to fear impeachment. He was appointed after Jefferson had been elected. Adams' appointment of Marshall foiled Jefferson's plan to appoint Spencer Roane, a strong Virginia advocate of states' rights, as Chief Justice.¹⁰⁵ If Jefferson had gotten this opportunity, it is difficult to even speculate as to what would have resulted from the complete domination of the national political machinery by the opponents of nationalism or centralization. It is not difficult, however, to comprehend the difficulties which the Court faced in rendering its decision in this case.

One of the factors that made a strong decision or any decision difficult in this case was the unimportant role which the Supreme Court had played in the national government. Some cognizance has been taken of the unpopularity of the courts and the lack of prestige and honor which accompanied the position of even the Chief Justice. In the short period of eleven years the Chief-Justiceship had been declined by several distinguished and able Americans. John Jay had refused reappointment as Chief Justice in 1799. Patrick Henry refused Adams' nomination to the office.¹⁰⁶ John Rutledge resigned as Associate-Justice of the Supreme Court of the United States to become Chief-Justice of the Supreme court of South Carolina.¹⁰⁷ William Cushman refused the dubious honor attached to membership on the

105 Ibid., 113.

106 Patrick Henry, William W. Henry, Editor, Life, Correspondence and Speeches, Charles Scribner's Sons, New York, 1891, II, 562-563.

107 Wharton, 35.

nations highest court.¹⁰⁸ There is general knowledge of the fact that in 1801 the Court had entertained few cases involving questions of constitutional law. Justice Story, an able associate as well as a devoted friend of Marshall, wrote that: "...when Chief Justice Marshall first took his seat on the bench, scarcely more than two or three questions of constitutional law had ever engaged the attention of the Supreme Court"...¹⁰⁹ Henry Hitchcock reports that the Court had heard six cases involving constitutional questions before 1801. Before taking up the decision in *Marbury vs. Madison*, a single statement reflecting Marshall's attitude toward the Republican attack on the judiciary may be allowed. Chancellor James Kent, is credited with the authorship of an unsigned statement,¹¹⁰ which reported that Marshall, following the repeal of the Federalist Judiciary Act of 1801, had suggested to his Associate Justices that they refuse to sit as Circuit Judges and await the results.¹¹¹ While this statement cannot be accepted as historical fact, it lends some weight to the natural belief that Marshall was opposed to the Republican acts against the already weak judiciary. It seems clear that in 1801 the Court had occupied a place in the conduct of government of its quarters in the basement of the Capitol would seem to indicate.¹¹² In anticipating Marshall's decision, it is not illogical to conclude that he would seek in every way

108 *Ibid.*, 33.

109 Dillon quoting Story, III, 375.

110 Beveridge, III, 122.

111 *Ibid.*

112 Dillon, quoting Hosea M. Knowlton, I, 198-199.

to repudiate the Republican acts against the judiciary and to raise the prestige and power of the Court to a station commensurate with its constitutionally effected status as a coordinate branch of the general government.¹¹³

In deciding the case in question pursuant to section 13 of the act of 1789, the Court could not logically avoid issuing the writ of mandamus against Madison. Marshall, however, was well aware of the fact that after issuing such an order, he was powerless to enforce it. Such a course would reduce the power and prestige of the Court rather than elevate them. If, as Beveridge suggested, the Court had denied itself power over any branch of the executive department and had dismissed the case, the judiciary would have only sunk to lower depths. The discussion of these alternatives implies that the case was not to be decided on the basis of purely legal principles and considerations. The large space in this study which has been devoted to a discussion of the general and immediate political events and influences which brought the case before the Court may be somewhat justified for this reason. Just as the case was largely provoked by political factors it is not unreasonable to seek evidences of political influences in the decision of the Court. Corwin wrote that Marshall's decision was, "...a political coup of the first magnitude".¹¹⁴ Swisher also emphasizes the political nature of Marshall's opinion.¹¹⁵ Corwin

113 Beveridge, III, 120.

114 Corwin, Marshall on the Constitution, 66.

115 Swisher, Constitutional Development, 56.

goes further and sets down the objects which Marshall achieved in his decision which were not essential and were not directly connected with judicial review. The Chief Justice employed the occasion as a means of scoring Jefferson for his violation of laws which he had sworn to uphold; he avoided passing on the constitutionality of the Republicans' Repeal Act of 1802; and finally, Marshall demonstrated the unwillingness of the Court to assume powers to which it was not entitled.¹¹⁶

On February 24, 1803, Marshall delivered the opinion of the Court. He had begun rendering most of the opinions of the Court himself in preference to the original method of having opinions given by the Justices Seriatim. Marshall first dealt with the question of the validity of Marbury's claim to the commission. Deciding that Marbury was entitled to the commission and that, "To withhold his commission, therefore, is an act deemed by the Court not warranted by law, but violative of a vested legal right,"¹¹⁷ Marshall proceeded to determine if the laws of the country afforded Marbury a legal remedy. The Chief Justice decided that question in the affirmative and agreed that mandamus was the proper remedy.¹¹⁸ However, Marbury's claim to the writ for which he applied rested on two basic considerations. These were: the nature of the writ sought and the power of the court in which the plaintiff was seeking relief.¹¹⁹ Marshall reasoned that the writ sought was of the proper nature. It was his

116 Corwin, Marshall on the Constitution, 66-67.

117 James Bradley Thayer, Cases on Constitutional Law, George H. Kent, Cambridge, 1895, I, 110.

118 Ibid.

119 Doskow, 19.

declaration that the Supreme Court was without power or jurisdiction to issue the writ sought, that gave Marshall the opportunity to claim, for the Supreme Court the power of judicial review. It is at this point that Marshall approached the kernel of his decision. In denying the power of the Court to issue the writ against Madison, Marshall noted that in the assignment of the judicial power of the Supreme Court to various classes of cases, the Constitution, "...declared that the Supreme Court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases the Supreme Court shall have appellate jurisdiction."¹²⁰ Moving on toward his chief objective, Marshall states that:

The authority therefore given to the Supreme Court, by the Act of establishing the judicial courts of the United States, to issue writs of mandamus to public officers appears not to be warranted by the constitution, and it becomes necessary to inquire whether a jurisdiction so conferred can be exercised. The question whether an Act repugnant to the Constitution can become the law of the land, is a question deeply interesting to the United States, but happily not of an intricacy proportioned to its interest. It seems only to recognize certain principles long and well established to decide it.¹²¹

It is this investigation and enunciation of principles substantiating the right Marshall claimed the Court possessed to nullify acts of Congress repugnant to the Constitution which merits the closest attention. The Chief Justice with resounding logic and remarkable simplicity and force-

¹²⁰ Ibid., 24-25.

¹²¹ 1 Cranch, 175.

fulness of speech laid down three broad principles upon which the power rests. The first of three fundamental principles expounded by Marshall maintained that the government of the United States is a government of delegated, defined and limited powers, which the people, by virtue of an "original right" and through a written Constitution, have divided among the three departments of the Central agency.¹²² In thus considering the source and nature of the government, Marshall said:

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness is the basis upon which the whole American fabric has been erected. The exercise of this original right is a very great exertion, nor can it nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental.¹²³

Having credited the people with "original", or, as Locke considers them, "pre-political rights," Marshall noted that the government was instituted to secure these rights. Locke enumerated the "pre-political" rights as life, liberty and estate.¹²⁴ In instituting a government to secure and protect their "original" rights, the American people adopted a written Constitution, and through it placed specific limitations upon the various departments. It is to the character of the government of the United States, the limitations imposed by the people through a written Constitution, and logical consequences of such a system that Marshall

122 C. G. Haines, The American Doctrine of Judicial Supremacy, University of California Press, Berkely, 1932, 29.

123 Thayer, Cases, I, 111.

124 John Locke, The Works of John Locke, D. Browne and Others, London, 1759, II, 191.

directs his thinking at this point.

This original and supreme will organizes the government and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments. The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or, that the legislature may alter the Constitution by an ordinary Act.¹²⁵

The second broad principle upon which Marshall based his doctrine of judicial review was that the written Constitution of the United States is superior to statutory or common law because it is the fundamental and paramount law of the nation.¹²⁶

The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law. If the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable. Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must.

¹²⁵ 1 Cranch, 176.

¹²⁶ Haines, 29.

be that an act of the legislature, repugnant to the Constitution, is void.¹²⁷

The third and last principle which Marshall expounded in this decision as a cornerstone of the doctrine of judicial review, asserts that the judges in the courts are expected to uphold the provisions of the Constitution as fundamental law and to refuse to enforce any legislative order which violates the Constitution. It is obvious that the most controversial aspect of the problem has been reached. Through a logical disquisition on widely known and generally accepted principles Marshall had shown that the Constitution of the United States is a plan through which the people had instituted a government of limited powers to secure and protect their inalienable rights of life, liberty and property. The Chief Justice had represented the Constitution as the supreme law of the land, and had rendered as untenable any proposition which controverted the principle that acts of the legislature or orders of the executive repugnant to the Constitution were void. To this point, however, Marshall had not established the source or the residence of the authority to judge with final and binding effect as to whether an act violated the Constitution or not. It was not difficult to see that this question constituted the main source of controversy. It was easy, as Marshall implied, to fully comprehend his first two principles. The object of the government was clearly stated in the preamble to the Constitution. The nature of the government could be drawn from a serious study of the Constitution and the history of the nation. The framers of the

127 Emlin McClain, A Selection of Cases on Constitutional Law, Little, Brown and Co., Boston, 1909, 816.

Constitution explicitly stated that the Constitution, laws made pursuant to it, and the treaties of the United States constituted the law of the nation. However, the framers ended their explicitness here and had left a great and basic question unanswered. William Meigs, an eminent writer in the field of constitutional law, recognized the existence of this central problem in the American constitutional system prior to the acceptance of Marshall's decision in this historic case. He wrote that:

...We conceive the main difficulty depended entirely on one question. There could be no doubt that the legislators were bound by their oaths of office to pass no law violating the Constitution, and that any such law was in pure abstract theory, void; but the difficulty still remained that unless some new means was invented, the law would practically be in full force and effect. Did the existing form of government afford such means, or were all the provisions of the fundamental law merely binding on the consciences of the legislators, as are undoubtedly many of the provisions of that instrument? This was we think the main trouble to be gotten over.¹²⁸

It is to this question that Marshall devoted the final statements in his argument. He seeks to resolve the question as to who possesses the authority to pass final judgement on the constitutionality and validity of legislative enactments.

It is emphatically the province of the duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If an act of the legislature, repugnant to the Constitution, is void, does it not withstanding its validity bind the courts, and oblige them to give it

128 William M. Meigs, "The Relation of the Judiciary to the Constitution," American Law Review, 1885, XIX, 189.

effect? Or in other words does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory....So if a law be in opposition to the Constitution if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty. If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution and not such an ordinary act must govern the case to which they both apply.¹²⁹

It is interesting to note here Marshall's investigation of the contention of those who, "...controvert the principle that the Constitution is to be considered in Court as a paramount law..."¹³⁰ Declaring that anyone who supports such a view must also maintain that, "...courts must close their eyes on the Constitution and see only the law,"¹³¹ Marshall proceeds, to attack such propositions with strokes of logic and reason which are at once demolishing and constructive. It is quite easy, in the light of historical development, to sense the frailty in an argument which holds that in questions stemming from a conflict between a statute and the Constitution, courts are not bound to examine and uphold the Constitution. Marshall attacks the theory in a strong, confident and convincing manner.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to

129 1 Cranch, 177.

130 Ibid., 817.

131 Ibid.

the principles and theory of our government, is entirely void, is yet, in practice completely obligatory. It would be giving to the legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.¹³²

Marshall then turns to the Constitution itself for a more firm foundation or support for his argument that Courts are bound to look to and uphold the Constitution where it conflicts with acts of the legislature.

...the peculiar expressions of the Constitution of the United States furnish additional arguments... The judicial power of the United States is extended to all cases arising under the Constitution. Could it be the intention of those who gave this power to say that in using it the Constitution should not be looked into? That a case arising under the Constitution should be decided without examination of the instrument under which it arises? There are many other parts of the Constitution which illustrate this subject. It is declared that no tax or duty shall be laid on articles exported from any State! Suppose a duty on the export of tobacco or of flour, and a suit instituted to recover it. Ought judgment to be rendered in such a case? Ought the judges to close their eyes on the Constitution and see only law? From these and many other selections which might be made it is apparent that the framers of the Constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature.¹³³

The Chief Justice now prepares to drive home his final bolt. In an irreproachable judicial attitude, Marshall involves the legislature and seeks to smother their objections to the Court's authority to invalidate unconstitutional legislative enactments. Selecting the Justices' oath of

¹³² Ibid.

¹³³ Cotton, Marshall's Decisions, I, 41-42.

office in which they swear to discharge their duties in a manner agreeable to the Constitution, Marshall points to the legislature as the author and administer of that oath. With his final object clearly in view, the Chief Justice sweeps aside all legislative impediments. He goes to the extent of ascribing criminal qualities to a legislature which would form and impose such an oath on a judge and then employ the judge as an instrument in the violation of the oath. He attaches the same criminal stigma to the judge who takes such an oath and then deliberately fails to execute it. Marshall argued:

Why does a judge swear to discharge his duties agreeably to the Constitution of the United States, if that Constitution forms no rule for his government? if it is closed upon him and cannot be inspected by him? The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support! If such things be the real state of things this is worst than solemn mockery to prescribe, or to take this oath becomes equally a crime.¹³⁴

Marshall then spoke his resounding conclusion:

Thus the particular phraseology of the Constitution confirms and strengthens the principle; supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that the courts as well as other departments are bound by that instrument. The rule must be discharged.¹³⁵

134 Ibid., 42-43.

135 Ibid., 43.

These were the arguments and reasonings with which John Marshall wove the principle of judicial review as permanently and firmly into American constitutional law as if the Constitution had stated the doctrine in explicit terms.¹³⁶ It has been obvious that in his opinion Marshall drew the doctrine from the Constitution through inference or implication and unanswerable logic. Even a casual examination of the facts and Marshall's opinion in the case shows that the section of the Chief Justice's opinion which asserted the principle of judicial review was "obiter dicta." Corwin wrote that, "this opinion bears many of the earmarks of a deliberate partisan coup"¹³⁷. McLaughlin felt that "The learned Justice really manufactured an opportunity to declare an act void."¹³⁸ A question which logically presents itself after an examination of the opinion is concerned with the immediate grounds for the acceptance of Marshall's opinion and its principle. What was the inherent quality or characteristic which gave the opinion so much force and authority? Brinton Cox, a widely respected and quoted writer on this subject, agrees with McMurtrie who,

...categorically asserts that the power of a judicial body to declare a law unconstitutional and void, is based exclusively upon inference and implication. At the same time, he maintains that such a power is so fully and thoroughly proved to be constitutional and legal by the opinion in *Marbury Vs. Madison* that no sane man can doubt the correctness of Chief Justice

136 Beveridge, III, 116.

137 Edward S. Corwin, The Doctrine of Judicial Review, Princeton University Press, Princeton, 1914, 10.

138 Andrew C. McLaughlin, "Marbury Vs. Madison Again," American Bar Association Journal, March, 1928, 156-157.

Marshall's reasoning therein.¹³⁹

When one considers the surpassing importance of the principles set forth in the case and the absence of specific constitutional texts to substantiate the doctrine, he is forced into a full awareness of Marshall's genius. A no less eminent jurist than Chancellor James Kent wrote of the opinion that:

In *Marbury Vs. Madison*, the subject was brought under the consideration of the Supreme Court of the United States, and received a clear and elaborate discussion. The power and duty of the judiciary to disregard an unconstitutional act of Congress, or of any state legislature, were declared in an argument approaching to the precision and certainty of a mathematical demonstration.¹⁴⁰

Of greater interest and importance, particularly to the student of history, than the immediate basis for the acceptance of Marshall's statement of the principle of judicial review are the historical and legal precedents for the doctrine. While the penetrating logic and power which Marshall employed in rendering the opinion are very impressive, it is only reasonable to conclude that judicial review would hardly have been founded on those grounds alone. The facts that there are no express constitutional grant of the power, that Marshall cited no historical or legal precedents, and that his decision in an immediate sense was founded on implication and logic, have given rise to several theories as to the fundamental or underlying bases of the doctrine. The question of the broad and fundamental factors which underlie the power of a court to declare void and inoperative

139 *Brinton Coxe, Judicial Powers and Unconstitutional Legislation*, Kay and Brother, Philadelphia, 1893, 50.

140 *James Kent, James M. Gould, Editor, Commentaries on American Law*, Little, Brown and Co., Boston, 1896, I, 453.

unconstitutional acts of the legislature is worthy of careful and extended consideration. It does not seem probable that a full comprehension and appreciation of the objects, merits and results of the principle can be realized without a knowledge of its source and authority. Chief Justice Marshall was a capable and appropriate medium for its assertion. He was not the author of judicial review. The interest of this project now turns to a brief and general perusal of those events, men and influences regarded by many of the learned writers in this field as the sources and authorities for the doctrine which Marshall so courageously announced from the bench of the Supreme Court in 1803.

Professor Corwin has attempted a concise grouping of the various theories as to the origin of the doctrine of judicial review. The first group he calls radical and ascribes to it the view that the power was secured by an act of judicial usurpation in the case of *Marbury Vs. Madison*.¹⁴¹ H.L. Boudin has stated the view of this group. In an interesting article he wrote that the legal precedents in the state courts were of negligible influence in the question,¹⁴² that the members of the Constitutional Convention did not contemplate the development of such a power,¹⁴³ and that neither Hamilton nor the majority of the American people approved or foresaw such a development.¹⁴⁴ Joseph Cotton Jr. supports this thesis in a somewhat milder fashion.¹⁴⁵ The second school of opinion as to the

141 Corwin, Doctrine of Judicial Review, 1.

142 H.L. Boudin, "Government by Judiciary," Political Science Quarterly, 1911, XVI, 244.

143 Ibid., 249.

144 Ibid.

145 Cotton, Constitutional Decisions, I, Introduction, 12-13.

legal basis for judicial review holds that certain clauses in the Constitution specifically granted the power.¹⁴⁶ The third group is comprised of those who maintain that the acquiescence of the American people constitutes the doctrine's authority.¹⁴⁷ A fourth group argues that it was the intention of the framers of the Constitution, sanctioned by contemporary ideas of their times, that such a power should develop.¹⁴⁸ The view held by McLaughlin, Kent, Thayer, McMaster, James Wilson, Bancroft, Farrand and others was expressed by McLaughlin when he wrote that:

A Court...is not without justification in giving weight to historical forces, principles which may have been begotten, and fundamental theories, upon which constitutions and laws must be supposed to rest. In fact, this particular judicial power rests so plainly on purely historical forces, rather than on any piece of formal logical argument from a document, that anything less than a discussion of historical influences leaves me in doubt concerning the courts' authority. We can recognize the basic principle of the decision only if we know the developments of American thought and of American constitutional principles during forty years and more before Marbury asked for the mandamus.¹⁴⁹

It seems mandatory in the execution of this project that some attention be given, though necessarily brief and general, to the historical and legal precedents of the doctrine of judicial review. There is no paucity of material to aid and guide the interested student. One can only admire

146 Corwin, Doctrine of Judicial Review, 2.

147 Ibid.

148 Ibid.

149 McLaughlin, A Constitutional History, 309-310.

and delight in the works of learned men in the fields of political science, jurisprudence, and history who have written such penetrating treatments on the evolution of the doctrine Marshall laid down in *Marbury vs. Madison*.

Just as the germ of many American political ideas and institutions had their birth far back in the history of Europe, it is possible to trace the genesis of the ideas and principles inherent in the doctrine of judicial review back to the middle ages and beyond. There is wide agreement among the early writers on the point that the three immediate principles which Marshall employed in his opinion are rooted in ideas and theories which are still broader and more fundamental. Haines wrote that the principles which Marshall expounded were,

...supplemented and modified by other theories and postulates which account for their effective application to American Law. They acquired their significance in American legal thinking because of a background of ideas inherited from Europe relating to superior fundamental laws and to the origin of such laws in concepts of natural laws or natural rights.¹⁵⁰

It is generally known that Americans of the Revolutionary period founded their claims to certain rights and privileges on the attachment and acquaintance which they had as Englishmen to specific concepts of fundamental law, and natural rights. McLaughlin is careful to indicate, however, that the idea of a fundamental law, which was "...primarily the embodiment of natural justice and reason,"¹⁵¹ was not confined to the English people or to English writers alone. It was rooted far back in European

150 Haines, 29.

151 McLaughlin, Courts, Parties and Constitution, 95.

history.¹⁵² The influence of continental European writers on American legal and political thought is indeed great and profound. James Otis,¹⁵³ Samuel Adams, Franklin, Madison, James Wilson, and other leading Americans show the influence on their thinking of the Continental writers. One of the most widely read, quoted and accepted political writers was Emmerich De Vattel. It was he who wrote The Law of Nations, which was published in 1758 and translated into English very shortly afterwards. It is in this work that the concepts of a fundamental law and natural rights were given a most erudite, though not original exposition. The Frenchman wrote of natural rights that:

It is a settled question on the natural law that all men inherit from nature a perfect liberty and independence, of which they cannot be deprived without their own consent. We must therefore apply to nations the law of nature, in order to discover what their obligations are and their rights: consequently the law of nations is originally no other than the law of nature applied to nations.¹⁵⁴

Reference to a fundamental law as a means of protecting and as an outgrowth of natural law has been made above. Vattel's concept of a fundamental law is in harmony with this view. It is his writing on the inviolability of the fundamental law by the legislature of the executive which has had such a direct bearing on the subject under discussion. Haines,¹⁵⁵

152 Ibid., 92.

153 James Otis, Rights of British Colonies Asserted and Proved, J. Williams, London, 1766, 110.

154 Emmerich De Vattel, Joseph Chittly, Editor, The Law of Nations or Principles of the Law of Nature, and J.W. Johnson and Co., Philadelphia, 1883, Preface, 56.

155 Haines, 43.

McLaughlin,¹⁵⁶ and other writers devote considerable space to a description of Vattel's influence on many of the leading figures in the American Revolution and the formation of the American Constitution. With regard to the impropriety of legislative infraction of the fundamental law of the state, Vattel wrote:

It is asked whether their power extends to the fundamental laws -whether they may change the Constitution of the state...the authority of these legislators does not extend so far and...they ought to consider the fundamental laws as sacred....For the constitution of a state ought to possess stability: and since that was first established by the nation, which afterwards intrusted certain persons with legislative power, the fundamental laws are excepted from their commission. In short, it is from the Constitution that those legislators derive their powers; how can they change it without destroying the foundation of their own authority.¹⁵⁷

The sacredness of the constitution and the inability of the executive or prince to violate it are maintained even more strictly. "The constitution and the fundamental laws are the plan on which the nation has resolved to labour for the attainment of happiness; the execution is entrusted to the prince. Let him religiously follow this plan; let him consider the fundamental law as sacred and inviolable."¹⁵⁸ The writings of Bacon, Montesquieu and others exerted great influence. Many Americans found

156 McLaughlin, Courts, Parties and Constitution, 94.

157 Vattel, 11.

158 Ibid., 14.

strong confirmation of the idea that natural justice and reason constituted a logical and legal restraint on government. It is only to be expected that the wide attention and publicity given these ideas during the eighteenth century caused them to affect and often dominate the thinking and actions of men charged with the conduct of government. With regard to the obligation of civil government to man's natural rights, James Wilson, in one of his lectures on the law, said: "...it is the business of civil government to protect, not to subvert, and to enlarge, and not to restrain."¹⁵⁹

It is clear that many of the treasured ideas and convictions which Americans held as to the inviolability of natural rights and fundamental laws were inherited from Europe. Many came to America directly. Others came by way of England. In addition to principles there were important English precedents which influenced in a direct and positive manner the American acceptance of the doctrine of judicial review. It seems appropriate to consider at this point some of the American historical and legal precedents or backgrounds occurring before the Revolution which foreshadowed the ultimate enunciation and acceptance of the doctrine of judicial review.

159 James Wilson, James D. Andrew, Editor, The Works of James Wilson, Callaghan and Co., Chicago, 1896, II, 335. It is interesting to note that Blackstone, who wrote during a period of parliamentary growth and asserted the supremacy of parliamentary acts, is quoted very frequently by Wilson in support of his natural rights argument. It illustrates a point made by McLaughlin that the Americans accepted quite literally the writings of early writers when they supported the American position. However, even Blackstone was set aside when, after the acceptance of the Constitution and during the Confederation, his arguments in support of the supremacy of Parliament became difficult to reconcile to the American view. See McLaughlin, Courts, Parties, and Constitution, 94.

One of the early experiences of the colonists which constituted a unique form of judicial review was the passage by the Privy Council of England on the validity of acts by the colonial governments as a means of exercising control of the Americans' policies and practices. It has been held that this exercise of authority by a superior government is analogous to and suggests the power of a court in reviewing the acts of a coordinate legislature.¹⁶⁰ The student of American history is well aware of the influence which the colonists' possession of written charters exercised on their adoption of written state constitutions and ultimately a written national Constitution. These charters and certain acts of Parliament provided the basis for determining whether the laws, customs or procedures in the colonies were violative of English law and therefore void. Actions by the governors were subject to a final veto, and after 1660 all acts of the colonies were required to be sent to England where they might be disallowed by the Privy Council.¹⁶¹ Elmer B. Russell has stated the direct relationship between this system of judicial review of colonial legislation by the Privy Council of England and the present American doctrine of judicial review. "...the work of the Privy Council constituted at once a precedent and a preparation for the power of judicial annulment upon constitutional grounds now exercised by the state and federal courts in the United States."¹⁶²

160 Haines, 44-45.

161 Haines, 45.

162 Elmer Beecher Russell, The Review of American Colonial Legislation by the King in Council, New York, 1915, 221-222.

The main historical and legal foundations for the principle of judicial review began in America during the period in the eighteenth century when the oppressive measures of the English government were provoking American thoughts of revolt and independence. The theory of natural rights lay at the base of the American Revolution. On the basis of their rights as human beings under the natural law and as Englishmen under the English fundamental law, Americans began to assert themselves on occasions, in ways and with expressions which exercised a profound influence on the evolution of judicial review.¹⁶³ Corwin feels that, "The inaugural event in the history of American Constitutional Law... was the argument made by James Otis at Boston in February 1761."¹⁶⁴ In this significant case Otis and Thacher represented the merchants of Boston in opposing the issuance of a general search warrant to British custom officials empowering them to search for smuggled goods. A British custom official named Paxton was the particular official in question. The great significance of Otis' argument in this case lies in his denial that Parliament was the absolute judge of the constitutionality and justice of its acts. Otis' argued that the acts of Parliament were subject to the scrutiny of the courts, and that it was the duty of the courts to declare unconstitutional statutes void.¹⁶⁵ In asserting this principle Otis was careful to recognize the jurisdiction which Parliament held over the colonies. The weight of his contention was enhanced by his

163 Quincy Reports 51 (1761).

164 Corwin, Doctrine of Judicial Review, 29. The outstanding legal and historical influence on the principle of judicial review during the years before the Revolution was provided in the Paxton Case on the Writs of Assistance.

165 Thayer, Cases, I, 48.

employment of learned English legal authorities to support his claim that acts of Parliament contrary to natural right and reason are void and should be so held by judges in the courts. The most impressive authority cited by Otis was Lord Coke, the learned, bold and respected jurist of seventeenth century England. It was Lord Coke who, face to face with James I, reminded the first Stuart that the King was under God and the law.¹⁶⁶ It is not surprising then, that in the famous Dr. Bonham's Case, 8 Coke 18, Lord Coke challenged the supremacy of parliamentary statutes. Coke in the Bonham had said that:

...it appeareth in our books that in many cases the common law will control Acts of Parliament and judge them to be utterly void; for where an Act of Parliament is against common right and reason or repugnant or impossible to be performed, the common law will control it and adjudge it to be void.¹⁶⁷

Another statement by a distinguished English judge, Lord Chief Justice Hobard in the case of Day vs. Savage, supported Otis in his argument of the question. Lord Hobard said that, "Even an Act of Parliament made against natural equity...is void in itself".¹⁶⁸ A third English judge of high competence, Lord Chief Justice Holt in the case of the City of London vs. Wood, states his agreement with Coke's views and denies their unreasonableness or extravagance.¹⁶⁹ Supported by such eminent legal figures in English

¹⁶⁶ Palmer, 2.

¹⁶⁷ Thayer, Cases, I, 48.

¹⁶⁸ Ibid., 49.

¹⁶⁹ Kent, Commentaries, I, 449.

history, Otis' argument maintaining the competence of the courts to invalidate even an act of Parliament which encroaches on the natural law was particularly effective and found wide favor among Americans. His argument asserting such judicial powers in 1761 was particularly gratifying to the colonists who were smarting under the pressure of Parliaments colonial trade laws. His maintenance of the sacredness and inviolability of natural rights and the fundamental law was directly in agreement with those Americans who were searching for ways of resisting English oppression. Otis appealed to the courts as protectors of the colonists' most cherished rights; the influence of his arguments on the doctrine of judicial review is clear.

There were many other positive historical precedents or influences on the principle Marshall announced in 1803 which occurred before the Revolution. Samuel Adams, one of the moving spirits in the struggle for independence, exercised a positive influence on the evolution of the principle of judicial review. He is credited with the responsibility, along with James Otis, of circulating through the colonies a letter which popularized the idea of a fundamental law. The letter stated that in all States:

...the Constitution is fixed; and as the supreme legislative derives its power and authority from the Constitution and it cannot overleap the Bounds of it without destroying its own foundation.¹⁷⁰

Haines feels that James Otis' views which he published in his pamphlet, Rights of British Colonies Asserted and Proved, in 1764, was of greater influence on the growth of judicial review than his argument in the Writs

170 William McDonald, Documentary Source Book of American History, Macmillan Co., New York, 1908, 148.

of Assistance Case.¹⁷¹ In his pamphlet Otis maintained that the powers of the legislature were limited by God and nature and it may not overstep them. In upholding this principle as the most fundamental in a free state, and England in particular, Otis denied the assertion that Parliament is either absolute or arbitrary in its acts.¹⁷²

Another event worthy of mention centers around the enforcement of the obnoxious Stamp Act. Governor Hutchinson testified that, "...the Act of Parliament is against Magna Carta, and the natural rights of Englishmen and therefore, according to Lord Coke, null and void".¹⁷³ Some law officers of Northampton County, Virginia, appeared before the court to ascertain whether they were bound to enforce the provisions of the Stamp Act. McMaster wrote of this case that: "The judges were unanimously of the opinion that the law did not bind, affect, or concern the inhabitants of Virginia, inasmuch as they conceived the said act to be unconstitutional".¹⁷⁴ In the case of Robin vs. Hardaway 1772,¹⁷⁵ Samuel Mason opposed the rights of traders to sell descendants of Indians as authorized in an act of the Colony of Virginia in 1692.¹⁷⁶ Mason held that the act of 1692 was contrary to natural right and therefore void.¹⁷⁷ The brief notice which has been taken of the historical antecedents to judicial review occurring in the

171 Haines, 60.

172 James Otis, Rights of British Colonies Asserted and Proved, Williams, London, 176, 70.

173 John Adams, Works, IX, 390-391.

174 McMaster, I, 394-395.

175 Jefferson's Virginia Reports, 109.

176 Haines, 63.

177 Ibid.

colonies before the Revolution reveals clearly that both English and early American history afford instances where lawyers and judges have declared acts of the supreme legislative body void because they violated the Constitution or natural law or both. Just as the practice was stimulated by the friction between the colonies and England, adherence to the principle was retarded after the issue was settled.

During the colonial period Americans had regarded their own colonial legislatures as protectors of their rights against English oppression. These colonial legislatures stood very close to the people. While the examples cited above reflect the tendency toward judicial review, most of them represent challenges of the legislative prerogatives of the English Parliament. The period of the Revolution is distinguished for the tremendous growth of authority in the state legislatures. Constitutional historians are almost unanimous in the large influence they credit William Blackstone's writings on the omnipotence of the legislative authority. The following extract from Blackstone's Commentaries show his views on the subject of English legislative prerogatives:

But if the Parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with authority to control it; and the examples usually alleged in support of this sense of the rule do none of them prove that where the main object of a statute is unreasonable the judges are at liberty to reject it; for that were to set the judicial power above that of the legislative, which would be subversive of all government.¹⁷⁸

178 William Blackstone, George Sharswood, Editor, Commentaries on the Laws of England, George W. Childs, Philadelphia, 1862, I, Book I, 90.

The net result of Blackstone's whole teachings, according to Edward Corwin, was to draw a sharp distinction between natural law and civil law and to assign civil obligations to civil law.¹⁷⁹ The teachings of Blackstone do not deny the existence of the natural law, but they refuse to concede it sufficient strength to crush the will of the legislature, however unreasonable. In view of the wide influence which his writings exerted on American minds, it is not illogical to conclude from the statement quoted above, that Blackstone opposed encroachments on legislative authority by both the courts and the constitution with such vigor as to impede the evolution of the American doctrine of judicial review. Thayer, after a close study of both the early and relatively recent editions of Blackstone, suggests that the views which the "learned commentator" held on Parliamentary or legislative prerogatives were not as firm and unqualified as the above extract indicates.¹⁸⁰ However popular and uncircumscribed the powers of the colonial legislatures had become by the end of the Revolution, the period from 1780 to 1787 marks the beginning of a reaction against the excessive acts of the state legislatures and the beginning of early strivings for a generally binding fundamental law.

The reaction against the broad powers enjoyed by the state legislatures during the period of government under the Articles of Confederation was reflected in several ways. Some cognizance has been taken of the extensive powers given by the people through their state constitutions to the

¹⁷⁹ Corwin, Doctrine of Judicial Review, 32.

¹⁸⁰ Thayer, Cases, I, 51-52.

legislatures and the affect of the Blackstone's teachings in support of legislative supremacy. Corwin emphasized the affect of the broad powers of the state legislatures between 1780 and 1787 as a deterrent to judicial review when he wrote that:

...the legislature itself, like the British Parliament and like the colonial legislatures before it exercised all kinds of power, and particularly did it exercise the power of interpreting the standing law and interfering with the course of justice as administered in the ordinary courts; and the only tests of its acts deemed available was that they should be passed in the usual form....as both Madison and Jefferson put the matter later, legislative power was the 'vortex' into which all other powers tended to be drawn. Obviously so long as this remained the case, there could be nothing like judicial review.¹⁸¹

Perhaps one example from an opinion of a New York court in 1784 which extols the supremacy of the legislature in perfect harmony with Blackstone's teachings on the subject will sufficiently illustrate the point.

The supremacy of the legislature need not be called into question; if they think fit positively to enact a law, there is no power to control them. When the main object of such a law is clearly expressed, and the intention is manifest, the judges are not at liberty...to reject it: for this were to set the judiciary above the legislative which would be subversive of all government.¹⁸²

This extract from a opinion of a New York court in 1784 is almost directly quoted from Blackstone's pen. This reverence for the work of the state

181 Corwin, Doctrine of Judicial Review, 36-37.

182 Coxe, 230.

legislatures which flowed from colonial experiences, English political practices and institutions, and the teaching of Blackstone's faith was exhibited throughout the states. It was the reaction to the theory and practice of legislative supremacy, coupled with a renewed and strengthened faith in old concepts that Americans had inherited regarding natural rights and fundamental law, which paved the road to Marshall's enunciation of judicial review.

The period of constitutional reaction which reached a peak in Shay's Rebellion in Massachusetts in 1786 and climaxed itself in the formation of the Constitution at Philadelphia in 1787, had two distinct phases. These two phases were: the clash between nationalism and state rights and the struggle between private rights and uncontrolled legislative power.¹⁸³ The assertion of nationalism as opposed to state sovereignty constitutes the basic theme of this paper and requires no special consideration here. However, the fight to curb the arbitrary powers of the state legislatures during the period of the Confederation is directly related to the evolution of the doctrine of judicial review which Marshall established as a rule in 1803.

It is not necessary here to go into a detailed consideration of the manifestations of legislative abuse and excessiveness during the period of the confederation. Moreover, the subject has received some treatment in a preceding chapter. Madison, in his usual air of conservatism, has, with sweeping strokes, painted a picture of the conditions stemming from legis-

¹⁸³ Corwin, Doctrine of Judicial Review, 37.

lative excessiveness between 1780 and 1787.

Complaints are everywhere heard from our most considerate and virtuous citizens, equally the friends of public faith and of public and personal liberty, that our governments are too unstable, that the public is disregarded in the conflict of rival parties, and that measures are too often decided, not according to the rules of justice and right but by the superior force of an interested and overbearing majority.¹⁸⁴

The history of the period 1780-1787 shows clearly that the state legislatures had violated the great trust which the people had placed in them. James Wilson, who had employed Blackstone in the confirmation of his views on natural justice now took issue with the great English commentator on the question of the sovereignty of the legislature. Wilson held firmly to the idea that the legislature was bound by Divine law, and he went further in maintaining that the courts had the authority to declare as void an act that violated natural justice.¹⁸⁵ Wilson sat with two other federal judges in the "first Hayburn Case", April, 1792, and declared an act of Congress unconstitutional.¹⁸⁶ Some writers consider the rashness of the legislatures as a main incentive behind the Convention at Philadelphia in 1787.¹⁸⁷ The excessiveness of the acts of the state legislatures paved the way during this period for the increased assertion by the courts of the right of judicial review. The stand taken by some judges in the name of natural law and reason constituted an effort to check the tyranny of the legislatures.

184 Alexander Hamilton, John Jay and James Madison, Henry Cabot Lodge, Editor, The Federalist, G.P. Putnam's Sons, New York, 1888, No. 10, 52.

185 Wilson, Works, II, 415.

186 McLaughlin, Courts, Parties, and the Constitution, 31.

187 Corwin, Doctrine of Judicial Review, 62.

The cases in which this principle was either stated or followed by the court are significant as historical if not legal precedents to *Marbury Vs.*

Madison, and merit attention here.

It is not difficult for the student to study these cases in the state courts before 1787 in which the judges claimed the competence to decide legislation to be constitutional or unconstitutional. While most of the thorough writers on the subject have given extended attention to these cases, William Meigs in less than thirty pages has presented an account of them which perhaps has not been surpassed for the thoroughness of its research and conciseness. In his article Meigs treats seven cases in the courts of five states before 1789.¹⁸⁸ The case of Josiah Philips of Virginia, 1778 has an interesting if indirect relation to the development of judicial control over legislation. Philips and a band of outlaws were accused of marauding and devastating within the state of Virginia. The Virginia Assembly in May, 1778 passed a bill of attainder against Philips and the outlaws.¹⁸⁹ A few weeks after the passage of the act, Philips was captured, tried and executed. Randolph, in the debates over the adoption of the Constitution in Virginia, argued that Philips was executed under the bill of attainder.¹⁹⁰ The specific relation of the case to the subject lies in the report by a contemporary jurist, who was an associate of some of the judges who presided at Philips' trial, that the court refused to pass

188 Meigs, "Relation of the Judiciary to the Constitution", 182.

189 Coxe, 220.

190 Elliot, Debates, III, 66-67.

judgement according to the act of the Assembly and ordered Philips tried according to the regular forms of the common law.¹⁹¹ Judge Tucker wrote that this case and the action of the judges on the legislature's bill of attainder, furnishes undeniable proof of the "...independence of the judiciary; a dependent judiciary might have executed the law whilst they execrated the principles upon which it was founded."¹⁹²

The second case in this series has received careful treatment by Thayer in his admirable work Cases on Constitutional Law. It is the case of Commonwealth Vs. Caton, Hopkins and Lamb, 1782.¹⁹³ In this litigation the defendants were tried and convicted of treason under an act of the Virginia legislature in 1776, which prevented the executive from granting pardon.¹⁹⁴ In June 1782 the House of Delegates passed a resolution pardoning the prisoners, but the Senate rejected the resolution. The court held that the Virginia act of 1776 was valid, but that the pardon granted by only one branch of the legislature was ineffective and void.¹⁹⁵ The court reporter noted that this was the first case in the United States in which the constitutionality of a state law was discussed before a tribunal.¹⁹⁶ The reporter also points out that: "Chancellor Blair and the rest of the judges

191 St. George Tucker, Editor, Blackstone's Commentaries, W.Y. Birch, Philadelphia, 1803, Appendix, I, 293.

192 Ibid.

193 4 Call's Report, 5.

194 Thayer, Cases, I, 55.

195 Ibid., 56.

196 4 Call, 20.

were of the opinion that the court had the power to declare any resolution or act of the legislature or of either branch of it, to be unconstitutional and void."¹⁹⁷ The words of Judge Wythe, a member of the court, are particularly forceful and demonstrative of the feeling of the judges on their responsibility to declare laws of the legislature which are repugnant to the constitution void. Judge Wythe said:

...if the whole legislature, an event to be deprecated, should attempt to overleap the bounds prescribed to them by the people, I, in administering the public justice of the county will meet the united powers at my seat in this tribunal; and, pointing to the constitution, will say to them, here is the limit of your authority; and hither shall you go, but no further.¹⁹⁸

The case of *Rutgers vs. Waddington*, New York, 1784,¹⁹⁹ is interesting for the delicacy of the court's approach. Without a discussion of the facts in the case, perhaps it will be adequate to consider the attitude of the court toward a state statute which Hamilton, as counsel for *Waddington*, claimed was in conflict with the Treaty of Peace with England and the Articles of Confederation, and was therefore void.

The court did not hold the statute void. It followed the reasoning of Blackstone, and mildly asserted that:

...when a law is expressed in general words, and some collateral matter, which happens to arise from those general words, is unreasonable, the judges are in decency...at liberty to expound the statute by equity, and only 'quod ad hoc' to disregard it.²⁰⁰

197 *Ibid.*

198 *Ibid.*, 7-8.

199 *Thayer, Cases*, I, 55.

200 Henry B. Dawson, Editor, *An Account of the Case of Elizabeth Rutgers vs. Joshua Waddington, Morrisania, New York, 1866*, 40.

Although the court in its opinion avoided a direct clash with the legislature, this case is of interest and has relation in the development of this subject.

The first case in the United States in which a law of the legislature was declared unconstitutional was the case of *Holmes vs. Walton*.²⁰¹ This was a New Jersey case which was decided in 1780. It is not unworthy of note that the presiding judge, Chief Justice Brealy, the New Jersey Attorney-General, Paterson, and Livingston, the Governor in 1780, were all delegates to the Constitutional Convention.²⁰² Paterson was on the bench of the Supreme of the Supreme Court when *Marbury vs. Madison* was decided. The court in this case sought to guard the right of trial by jury from alteration by the legislature. In its opinion the court stated that the right of trial by jury would be retained, "...as a part of the law of this colony without repeal forever."²⁰³ The court then proceeded to declare void the act of the legislature which authorized trial in certain cases by a jury of six men with no appeal.²⁰⁴

One of the most outstanding cases involving the nullification of an act of the legislature by a judicial body occurred in Rhode Island in 1788. It was the case of *Trevett vs. Weeden*. Justice Haswell acting for the court, refused to take cognizance of a case founded on an act of the legislature which abolished trial by jury and the right of appeal in cases

201 Haines, 92.

202 McLaughlin, Courts, Parties, and the Constitution, 43.

203 Haines, 93.

204 Ibid.

brought against persons who refused to honor the paper currency which the legislature had provided.²⁰⁵ James Varnum, who argued the case for the victorious defendant, Weeden, claimed the invalidity of the act at the beginning of the trial. Space will not permit here a discussion of the interesting arguments and general circumstances which attended the decision of the court in this case. The decision was well received by the merchant class. The case constitutes a genuine instance of judicial review and an important antecedent of *Marbury vs. Madison*.

The final case in this series was decided about the time when the Convention to frame the Constitution was getting underway. It was the case of *Bayard vs. Singleton*, which was heard in North Carolina in 1787.²⁰⁶ In this litigation too, the court sought to protect the right of the individual against legislative alteration of his right of trial by jury.²⁰⁷ The facts and circumstances attached to this case are interesting as well as instructive, but they need not be examined here. Perhaps it will be adequate to state the view of the court which held that the motion for trial based on the act of the legislature and the act, "...which condemned a citizen in his property without a trial... stand as abrogated and without any effect".²⁰⁸

The writer has not brought the above cases into view with any idea that they constitute a strong, positive, and single source of the doctrine

205 James M. Varnum, The Case of Trevett Against Weeden, J. Carter, Providence, 1787, 4.

206 1 Martin, 42.

207 Ibid., 47

208 Ibid.

laid down in *Marbury vs. Madison*. It is not difficult to overestimate the influence which they did exert. Perhaps the principal value to be derived from a discussion of these cases is the knowledge they give of the attitude of the courts on the subject under consideration. The cases undoubtedly form another historical cornerstone to Marshall's decision. It was Gerry in the Constitutional Convention who declared that the courts had on many occasions exercised the power of review supported by popular approval.²⁰⁹ The student of today is able to point to these early cases, which materialized before the Constitution, and find partial confirmation of the idea that the power of the court to pass on the constitutionality of legislative acts is founded on historical and legal precedent and gradual growth as distinguished from sudden appearance. The citation of the above cases has brought the discussion down to the year 1787 and the Constitutional Convention which met at Philadelphia. The question as to whether the framers intended the development of such judicial competence arises quite logically and is so engaging as to command special attention. However, it may not be readily or easily answered.

In seeking to determine the answer to this question, the student can hardly do more than practically all careful writers on this subject; and that is to examine the records of the Convention itself for concrete indications of the attitude of the delegates. Professor Corwin states, and the writer has verified his contention, that seventeen framers, or fully

209 Elliot, Debates, V, 151.

three-fourths of the men who were the actual leaders of the Convention, were positive in their assertions that the Constitution empowered the courts to pass on the constitutionality of acts of Congress.²¹⁰ These men who clearly supported judicial review were: Gerry, Wilson, Gouverneur Morris, Randolph, Martin, Madison, Dickinson, Yates, Hamilton, Rutledge, Mason, Charles Pinckney, Davie, Williamson, Sherman and Ellsworth. Among these men, as Corwin points out, are four of the five members of the Committee of Detail, Rutledge, Randolph, Ellsworth and Wilson.²¹¹ There were also four of the five members of the Committee of Style, Hamilton, Morris, Madison and King.²¹² It seems that only three delegates went on record as opposing the power of the courts to invalidate acts of Congress.²¹³ The question arises as to why the framers did not explicitly state the principle in the Constitution. Several writers answer this question by stating that the framers felt the power to be evident from their incorporation of certain principles in the Constitution.²¹⁴ Professor Beard's article, in what McLaughlin describes as "a clever attempt in a clever manner,"²¹⁵ throws

210 Corwin, Doctrine of Judicial Review, 10.

211 Evidence of the attitude of these men may be found at the following references. Elliot, Debates: II 1898-99 (Ellsworth), 417 and 454 (Wilson), 336-37 (Hamilton); III, 197(Randolph), 441(Mason), 484-85 (Madison); IV, 165(Davie). Max Farrand, Records of the Federal Convention, Yale University Press, New Haven, 1913: I, 97(Gerry), 109(King); II, 73(Wilson), 76(Martin), 78(Mason), 299(Dickinson and Morris), 428(Rutledge), 248(Pinckney), 376(Williamson), 28(Sherman), 93(Madison). See Corwin, Doctrine of Judicial Review, 11.

212 Ibid.

213 Ibid., 12.

214 Ibid., 13. Haines, 132. McLaughlin, Courts, Parties and the Constitution, 133-135. In his impressive study, Brinton Coxe holds that specific clauses in the Constitution provide for judicial review. Coxe, 336. McLaughlin and Corwin, among others do not accept this view.

215 McLaughlin, Courts, Parties and the Constitution, 37. The article referred to is "The Supreme Court-Usurper or Grantee", Political Science Q. 1912, 1.

the weight of the Convention behind judicial review. In his book, The Supreme Court and the Constitution, Beard states that one-third of the fifty-five delegates took little or no part in the proceedings; and of the twenty-five men who controlled the Convention, seventeen declared themselves for judicial review of legislation.²¹⁶ Basing his conclusions on what was said both before and after the Convention, Professor Beard concludes that: "We are justified in asserting that twenty-five members of the Convention favored or at least accepted some form of judicial control. This number understood that federal judges could refuse to enforce unconstitutional legislation."²¹⁷ In imputing this intent to the framers of the Constitution, there is no desire to imply that the judiciary was being constructed as an authority superior to the executive or legislature. The dominant aim of the framers was to restrain government in such a manner and to such an extent as to give the maximum protection to individual rights and private property. It seems sound to conclude that many of the leading delegates to the Convention wished to invest the judiciary with a separate and independent character, and to assign to it the particular function of deciding and applying the law. From this desire, which stemmed from the nature of the government formed in the Constitution and ideas existing both before and after the Revolution, flowed a federal judicial competence to invalidate unconstitutional acts of Congress.

216 Charles Beard, The Supreme Court and the Constitution, Macmillan Co., 1912, 16.

217 Ibid., 60-61.

The final period which will be briefly scanned for cases or influences on the rule Marshall laid down in *Marbury Vs. Madison* is that between 1789 and 1803. It may well be restated here that this approach to the subject has been taken for the enlightenment it casts on the state of mind of the judges and the people with regard to judicial control. It has been shown that the practice of state courts declaring unconstitutional acts of state legislatures void had begun before 1787. The legal antecedents of *Marbury Vs. Madison* in the federal courts during the period, 1789-1803, claims attention at this point. In 1795 there arose the case of *Vanhorne's Lessee Vs. Dorrance*.²¹⁸ A detailed review of the facts in the case seems unwarranted. The importance of the case to this subject lies in the statements made by Justice Paterson in his consideration of the relative positions of the Constitution, legislature and the courts. The case was heard in the Federal Circuit Court of the United States, Pennsylvania District, and involved the consideration of the constitutionality of an act of the legislature. Quoting Blackstone in his statement that in a practical sense the English Parliament was supreme and uncontrolled, Paterson deprecated the absence of a written constitution by which the acts of Parliament could be tested. He then described the American constitutional system and stated the following principle:

I take it to be a clear position that if a legislative Act oppugns a constitutional principle, the former must give way, and be rejected on the score of repugnance. I hold it to be a position equally clear and sound, that, in such case, it will be the duty of the Court to adhere to the

218 2 Dallas, 304.

Constitution, and to declare the act null and void.²¹⁹

Charles Haines reports that this case is usually regarded as the first in which a federal court nullified an act of the state legislature, although Warren reports two previous cases.²²⁰

A second case related to the principle in question was that of *Ware Vs. Hylton*, in 1798.²²¹ In this case the Supreme Court sustained the constitutionality of an act of Congress which was being attacked. Justice Chase, however, implied that the Court was not without authority to invalidate unconstitutional acts of Congress.²²² The final case to be cited in this connection appeared in 1798 before the Supreme Court under the title of *Calder Vs. Bull*. In this case Justices Chase, Iredell, and Paterson concurred on the powers of the courts to annul unconstitutional acts of Congress. Both Chase and Iredell reiterated views that they had expressed earlier on the great restraint and circumspection which should attend the exercise of this power.²²³ This is not a complete list of the cases in this period which had some direct relation to the principle laid down by Marshall. The failure to attempt any detailed discussion of the views which Hamilton and Madison expressed in the *Federalist* has been deliberate. It is generally known and appreciated that both men supported the principle in that learned treatise.²²⁴ The influence of such an able jurist as James Wilson

219 *Ibid.*, 310.

220 Haines, 181, Haines cites Warren's article, "Earliest Cases of Judicial Review of State Legislation by Federal Courts," *Yale Law Review*, 1922, XXXII, 23.

221 3 *Dallas*, 171.

222 *Ibid.*, 397.

223 *Ibid.*, 397.

224 Hamilton, Jay and Madison, *The Federalist*, No. 39, 238(Madison); No. 78, 485(Hamilton).

has been noted, as well as the attitude of the members of Congress in debates prior to February 24, 1803.

Marbury vs. Madison is important as a case because it was the litigation which gave the Supreme Court the opportunity or occasion to lay down for the first time the principle of judicial review as a binding and unconstitutional rule. John Marshall merits the great prestige and praise accorded him because he possessed the talent, conviction, tact, skill, courage, and title with which to influence the Court in its judgement. He announced the doctrine at such a time and in such a forceful and irrefutable manner as to integrate it into the American system, as securely as if the Constitution expressly granted the power. It is felt that the space devoted to the case has not been disproportionate to the importance of the principle. It seems safe to state that without the consideration of the historical background to the case which has been attempted here, the student is left without any clear opinion as to the real source of the principle. Judicial review did not spring up in Marshall's intellect; it grew gradually with other political ideas and institutions across the centuries. Indeed, it is the logical historical foundation and evolution of the doctrine and its eventual applicability to the American system of government which has furnished the principle with its security, and has motivated the American people in their acquiescence to its exercise. Just as Meigs, McLaughlin, Haines, Corwin, Coxe, Warren, Beard, Thayer, Kent, Wilson, McMaster, Bancroft and others have perceived and discussed the historical rootings of the principle, others have been more concerned with its workings merits and effects. Perhaps in closing this section, some very brief mention of the regard in which Marshall and the doctrine have been held by writers and

jurists of a more recent date will not be improper or without relevance.

A writer who is distinguished for his penetrating work on the American system of government detected a great flaw in the constitutional fabric of the country at the same point where Hitchcock and others have seen strength. Lord Bryce wrote of the American principle of judicial review that:

A singular result of the importance of constitutional interpretation in the American Government...is this, that the United States legislature has been largely occupied in purely legal discussions....Legal studies are apt to dwarf and obscure the more substantially important issues of principle and policy, distracting from these latter the attention of the nation as well as the skill of congressional debaters.²²⁵

James B. Thayer, writing in the Harvard Law Review, agrees with this English student of American government. However, it is quite striking that after more than three quarters of a century of operation such competent students of American system could not detect a more unfortunate or destructive outgrowth of the operation of the principle. While few of the authors referred to in this paper have offered serious objections to the power exercised by the courts many varied views have been expressed with regard to the manner, authority and effect of its operation.

Some observation has been made of the founding fathers' intention to erect a government for the primary purpose of protecting individual liberty and property. Attention was also given the influence which the excessive, partisan and selfish measures of the state legislatures exerted on the development of the doctrine of judicial review. In view of these factors, the opinion of

²²⁵ James Bryce, The American Commonwealth, Macmillan Co., London, 1891, I, 377.

James B. Thayer regarding the force of judicial review as a protection against legislative encroachment on individual rights becomes as interesting as it appears unique. The eminent member of the Harvard law faculty felt that judicial review was not primarily instituted to protect the people against legislative violation of the Constitution.²²⁶ Thayer's main point in support of this contention is not easily dismissed or refuted.

The judiciary may well reflect that if they had been regarded by the people as the chief protection against legislative violation of the Constitution they would not have been allowed this more incidental or postponed control. They would have been let in, as it was sometimes endeavored in the conventions to let them in, to a revision of the laws before they began to operate.²²⁷

Stating his belief that under no system can the courts save a people from ruin,²²⁸ Thayer shows the extent to which what seems at first to be a broad judicial power has been narrowed down and reduced. He points to the fact that courts can decide only specifically litigated cases, and must not annul any legislative act over which there is doubt. He also points out another principle which works toward the limitation of the power of the courts under the doctrine of judicial review.

In a case of purely political acts and of the exercise of mere discretion it matters not that other departments were violating the constitution, the judiciary could not interfere; on the contrary, they must accept and enforce their acts.²²⁹

A distinct opinion which may be derived from Thayer's views would be that the

226 Thayer, "American Doctrine of Constitutional Law", 136.

227 Ibid.

228 Ibid., 156.

229 Ibid., 134.

power of the courts under the principle of review is not as broad and extended as it appears. However, it can hardly be denied that the courts have served on many occasions as the protectors of individual rights. The erudite William Meigs wrote in opposition to Thayer's views that the practice of judicial review has, "...in innumerable instances, furnished protection to the individual against those encroachments on his rights which legislative bodies are only too frequently led into."²³⁰

In viewing another aspect of the principle Meigs states the opinion of a large minority. After questioning the merit of the idea which holds that other departments are conclusively bound by the courts' decision, Meigs maintains that it is quite unreasonable to grant the Court such unlimited authority over all people and agents of the government especially in 5-4 decisions.²³¹ He holds that a much better theory would be to arrive at a final decision in a question by, "...gradual growth, recognition, and crystallization of truth from the unceasing conflict of opinion and if need be, the occasional conflict and clashing of different departments of our government".²³² Of interest also is the clash between the views of Herbert Pope and William Meigs. The latter holds that the American doctrine of judicial review is new and original with Americans and points to the great distinctions between the American and English systems of constitutional law. Pope emphasizes the similarity between the two systems. The main point upon which Pope's argument turns is his belief that: "...the existence and development of all law, whether fundamental or common is

230 Meigs, "Relation of the Judiciary to the Constitution, 177."

231 Ibid., 191.

232 Ibid.

dependent upon the existence of a court having power to interpret and enforce it. Without the court the law does not exist."²³³ From this general premise Pope decides that there is no theoretical difference between the English and American fundamental law. The only practical difference is that in England the legislature and the highest court are one, in the United States they are separate.²³⁴

While diversity of opinion on various aspects of the doctrine is inevitable, one conclusion is sound. It is that:

...the doctrine has been received with that unanimity and general absence of serious conflict which are only to be found where there has been no ability to oppose from weakness, or where the new principle is based on reasons as well as those of expediency. It is now... entirely interwoven with and become an integral part of all our forms and processes of reasonings on which it rests....²³⁵

233 Herbert Pope, "The Fundamental Law and the Courts," Harvard Law Review, 1913, XXVII, 45-67.

234 Ibid., 46.

235 Meigs, "Relation of the Judiciary to the Constitution", 177.

CHAPTER IV

THE DARTMOUTH COLLEGE CASE

The second class of opinions by John Marshall in the field of constitutional law comprises those cases which stemmed from the specific restraints on the state governments by the Federal Constitution. Perhaps the classic case in this group is that of the trustees of the Dartmouth Colleges vs. William Woodward.¹

The importance of this case to the development of American constitutional law has been generously stated by many writers and jurists. All writers list it among Marshall's greatest opinions. Chancellor Kent, a contemporary of the proceedings, wrote that:

The decision in the case did more than any other single act, proceeding from the authority of the United States, to throw an impregnable barrier around all rights and franchises derived from the grant of government; and to give solidity and inviolability to the literary, charitable, religious,² and commercial institutions of our country.

Joseph Cotton, Jr., writing years after the doctrine as set down in the Dartmouth College case had been whittled down and more clearly outlined, was still able to point to Marshall's decision in the case as a vital and transcending contribution to American constitutionalism. He wrote after the turn of the century that the surpassing importance of the Dartmouth College

¹ 4 Wheaton, 513

² Kent, Commentaries, I, 419.

case lay in the fact that:

...it fixed the popular as well as the legal mind in favor of the stability of corporate enterprise and securities. Its doctrine became a legal watchword--a maxim. It fixed the point of view toward corporate enterprise. That stability that the British company found in the conservatism of its Parliament Marshall gave to the United States in its written Constitution. ...it seems a sound statement to say that the business world, and its methods of industry have never been so far moulded and affected by any other American judicial decision.³

There are many persons who would not go the entire lengths expressed in Cotton's last statement. This is particularly true in view of the many cases of serious import to national economic institutions and processes which have been decided in the Supreme Court since 1905, the date Cotton's statement was published. That there is much truth and validity in his appraisal of the significance of the case is undeniable.

The historical background of this case is by no means as extended and directly related to a comprehension of the Courts' decision, its aims or consequences as in the case of *Marbury vs. Madison*. However, it seems appropriate to suggest at least one basic factor which operated as both a general and immediate stimulant to the litigation before the courts. In *Marbury vs. Madison*, Marshall and his Associate Justices sought to interpret the Constitution in conformance with the intention of the framers to set up an efficient central government, and in accord with long standing concepts of natural rights and fundamental law. The case under discussion in this section

³ Cotton, Decisions, I, 350.

brings to Marshall the task of applying the tenets of constitutional law as set down in the Constitution in an effort to block encroachments by state governments on private rights.

It may be seen immediately that the litigation in the Dartmouth College case was but a facet of one of the main problems which had plagued the American nation since it had won its independence. The historical background of this case is found in the continual and sometimes bitter striving by owners of private property for protection from legislative oppression. It is not necessary to develop this subject which treats the growth of legislative power in the state governments and legislative disregard for the inviolability of contracts and the inalienable right of persons to property. An attempt has been made to treat the subject in a preceding chapter of this project. However, it may be said by way of reiteration that state legislatures, through the enactment of "special legislation", had intervened in private controversies either decided or pending in the courts,

...with the result that judgements were set aside, executions canceled, new hearings granted, new rules of evidence introduced, void wills validated, valid contracts voided, forfeitures pronounced--all by legislative mandate.⁴

In view of the doctrine of "due process" and other legal developments, it is somewhat difficult today to imagine such unbridled legislative prerogative.⁵ It has been shown in the earlier pages of this study that this desire for the security of property and person against state legislative power

⁴ Corwin, Marshall and the Constitution, 148-149

⁵ Ibid., 147

was one of the dominant, if not the dominant, motives prompting the formation and acceptance of the Constitution.⁶ Even before the great Convention, state courts had already begun to nullify legislative acts on the grounds that they violated natural justice.⁷ The Dartmouth College case stems from an appeal by a private corporation to the Supreme Court for the protection of its rights from state legislative encroachment. No further attention to the historical factors behind the litigation in this case seems warranted. However, a brief consideration of two important legal precedents which foreshadowed the decision in the Dartmouth College case may be permitted.

The case of Fletcher vs. Peck⁸ came before the Supreme Court in 1810. It stemmed from an act by the Georgia legislature on January 7, 1795, which authorized the sale of a large tract of land.⁹ Through the use of letters-patent, grants were made to certain individuals who constituted the Georgia Company. Fletcher held a deed from Peck for some of this land. In the deed Peck had covenanted that the state of Georgia had been legally qualified to make the grants or sales, and that the title to the land deeded was valid and unquestionable. Subsequent to the act of the legislature authorizing the grant, it was revealed that most of the legislators had been bribed or owned stock in the company seeking the grant.¹⁰ McMaster wrote that, "No sooner did the true character of the sale become known than the State, from the

6 Ibid.

7 Haines, 77

8 6, Cranch, 87.

9 Cotton, Constitutional Decisions, I, 229.

10 McMaster, II, 380.

from the mountains to the sea, was aflame. Every member of the legislature came and solemnly pledged to repeal the act. Accordingly, on the thirteenth of February, 1796, the legislature pronounced the sale unconstitutional, null, and void."¹¹ Fletcher brought action for breach of covenant based on the act of the Georgia legislature of 1796, which repealed the law as passed by the previous legislature. The case went on a writ of error from the Circuit Court of the United States for the District of Massachusetts to the Supreme Court.¹²

Connected with the case are several interesting legal and historical questions which need not be discussed here. The present interest in *Fletcher vs. Peck* is restricted to the Courts' solution of the question whether or not the legislature of Georgia could constitutionally repeal the act of 1795, thereby rescinding the grant of land and impairing obligations of contracts made pursuant to original statute.

In view of the very strong support that the general citizenry of Georgia gave the movement to repeal the statute of 1795, and the undeniable evidences of fraud and corruption which had attended the passage of the original act,¹³ it would not have been difficult for the Court to avoid a direct decision as to the constitutionality of the act of repeal.¹⁴ In his opinion Marshall holds the act of repeal unconstitutional on two grounds. The Chief Justices' first point declares the law void because it amounted to a violation of vested rights. In support of this argument, he said:

If the legislature felt itself absolved
from those rules of property which are common

¹¹ Ibid.

¹² Thayer, Cases, I, 114.

¹³ Corwin, MARSHALL and the Constitution, 151.

¹⁴ Ibid.

to all citizens of the United States, and from those principles of equity in all our courts, its Act is to be supported by its power alone, and the same power may divest any other individual of his lands, if it shall be the will of the legislature so to exert it. The principle is this: that a legislature may, by its own Act, divest the vested estate of any man whatever, for reasons which shall by itself, be deemed sufficient.¹⁵

On the basis of this principle which, if allowed to stand, would undermine the very foundation of society, Marshall immediately denies the validity of the rescinding act.¹⁶ The second point upon which he bases his invalidation of the act, rests on firmer constitutional grounds. It is this principle which directly links *Fletcher vs. Peck* to the *Dartmouth College* case. Marshall declares the act of repeal by the legislature of Georgia was a violation of Article I, section 10 of the Constitution, which denies a state the power to pass a law which impairs the obligation of contract.

When...a law is in its nature a contract, when absolute rights have been vested under that contract, a repeal of the law cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community. The State shall pass any bill of attainder, 'ex-post facto' law, or law impairing the obligation of contract. A law annulling conveyances between individuals, and declaring that the grantors should stand seized of their former estates, notwithstanding those grants, would be as repugnant to the Constitution as a law discharging the vendors of property from the obligation or executing their contracts by conveyances.¹⁷

It is interesting to note the lack of compactness and cogency with which

15 Thayer, Cases, I, 119.

16 Ibid.

17 Thayer, Cases, I, 120-121.

Marshall resolves the main question in this case.¹⁸ It was the incompleteness of the opinion in *Fletcher vs. Peck*, although the principle was considerably expanded in *New Jersey vs. Wilson*,¹⁹ which gave the *College* case its great importance in American constitutional development. The following extract from Marshall's concluding statements in *Fletcher vs. Peck* paves the way and almost foretells his opinion in the *College* cases:

It is, then, the unanimous opinion of the court, that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the state of Georgia was restrained either by general principles which are common to our free institutions, or by the particular provisions of the Constitution of the United States, from passing a law, whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void.²⁰

Two years after the decision in *Fletcher vs. Peck*, 1810, the case of *New Jersey vs. Wilson* came before the Supreme Court on a Writ of error from the highest court of appeals in New Jersey. The facts in the case stemmed from the passage on August 12, 1758 of an act by the New Jersey legislature which authorized: the purchase of certain lands from the Indians in the state, the restraint of the Indians from granting leases or making sales of certain lands, and the exemption of certain reserved lands from, "...any tax, any law, or usage, or custom to the contrary thereof, in any wise, notwithstanding."²¹ In 1801 the Indians applied to the legislature and received

18 Corwin, Marshall and the Constitution, 152.

19 7 Cranch, 164.

20 Thayer, *Cases*, I, 122.

21 Ibid., II, 1562.

authority through an act of the legislature to sell the lands.²² The state statute imposed no restriction on the sale,²³ and the land was bought from the Indians.²⁴ In October, 1804, the legislature repealed that section of the act of 1758 which exempted the lands in question from taxation.²⁵ The state then proceeded to levy taxes on the land which was now owned by George Painter and others.²⁶ The owners resorted to the courts for protection from what they considered to be the unjust levies of the state. Marshall gave the opinion of the Court. He held the act of repeal to be unconstitutional strictly on the grounds that it violated the contract clause of the Constitution.²⁷ Joseph Cotton, Jr., wrote of Marshall's opinion in this case that:

The case is the second of Marshall's great cases on the question of impairment of contracts, the least considered of them, and it would seem now the most unfortunate of them. True it is of vital importance that legislative contracts made by a state, even when unwise, would not be impaired by later legislation, but as an original question it seems most doubtful whether any legislature has a right to deprive subsequent legislatures of the very bone and sinew of governmental power, the right to tax.²⁸

Cotton goes further and shows how, in later decision, the Court has laid down the doctrine that state legislatures in the exercise of what is now called the "police power," have been able to protect themselves and their powers. In spite of Cotton's objections and the continued reverberation of judicial

22 Ibid.

23 Ibid.

24 Ibid.

25 Ibid.

26 Cotton, Marshall's Decisions, I, 260.

27 Ibid., 1563.

28 Cotton, Marshall's Decisions, I, 255-56.

dissent and restriction, the spirit of Marshall's opinion has not been radically altered.

The two cases discussed above constitute very positive precedents to the Dartmouth College case. All three of the cases were rooted in different aspects of the same constitutional question and were resolved on the authority of the same constitutional principle. A fuller appreciation and comprehension of the great import of the decision in the College case will result from a knowledge of Marshall's attitude and reasoning in *Fletcher vs. Peck* and *New Jersey vs. Wilson*. The attention of this study is now directed to a review of the facts and events which led to the appearance of the Dartmouth College case before the Supreme Court in March, 1818.

The history of the Dartmouth College litigation is rooted in the foundation of a school by Eleazar Wheelock in the colony of New Hampshire for the training of Indians.²⁹ Wheelock was born in Windham, Connecticut, April 22, 1711.³⁰ Converted at an early age, Wheelock entered Yale College in 1729 and was graduated with honors in 1733.³¹ Receiving his license to preach from the New Haven Association in 1734, he settled down to preach in June of the same year at a site called Lebanon Crank, Connecticut.³² On the impetus of the "Great Awakening," which was a surge of religious interest, Wheelock began to preach extensively throughout the area. He possessed striking features and a voice that was at once, "...full, harmonious, and commanding."³³ It was

29 McLaughlin, *Constitutional History*, 385.

30 Frederick Chase, John K. Lord, Editor, A History of Dartmouth College and the Town of Hanover, John Wilson and Son, Cambridge, 1891 I, 1.

31 Ibid., 2

32 Ibid., 2-3

33 Eleazar Wheelock, David McClure, Editor, Memoirs of the Rev. Eleazar Wheelock Edward, Little & Co., Newburyport, 1811. 51.

in connection with his travels as an evangelist that he met George Whitefield in New York in May, 1740.³⁴ There seems to be no need to attempt a full treatment of Wheelock's personality here. However, it may be appropriate to report the general circumstances which prompted him to sponsor education for Indians.

The salary which the gifted evangelist received is said to have been so small that he was forced to seek additional sources of income with which to support his wife, Mary Binsmead, and their five children.³⁵ Following an avocation common among New England ministers, Wheelock began instructing young men who planned to do college study.³⁶ The teaching grew in importance to him. Wheelock's sincere and creditable efforts to train and Christianize the nearby Indians was considerably influenced by the belief that he shared with many other New England Ministers, that the Indians were really the Ten Tribes of the House of Israel.³⁷ On December 6, 1743, Wheelock admitted a youthful member of the Mohegan Tribe, Samson Occom, to his school.³⁸ Aided by various societies and individuals the work of educating both the Indian and white children broadened. In 1754 a regular school with an assistant was set up and the theater of Wheelock's work was greatly expanded.³⁹ The most serious of the new problems encountered was the lack of adequate funds. Trouble with

34 Chase, 34.

35 Ibid., 2.

36 Ibid., 7

37 Wheelock, Memoirs, 18.

38 John Shirley, The Dartmouth College Causes, G.I. Jones and Co. St. Louis, 1879, 67.

39 Ibid., 68

the Indians on the fringes of the English settlements developed, and the usually generous American donors were discouraged in their support of the school.⁴⁰

On the advice of his loyal supporters, among whom was Nathaniel Whitaker and Governor John Wentworth of New Hampshire, Wheelock decided to send his disciples, Whitaker and Samson Occom, the latter being a devout and talented Indian, to England to solicit funds. They set sail for England on December 23, 1765.⁴¹ The solicitations in England proved quite successful. Beveridge reports that over eleven thousand pounds were raised and placed under the control of a group of trustees, headed by the Earl of Dartmouth.⁴² The Earl had been one of the first and most generous donors, and it was for him that the school was named.⁴³ It was only natural that the possession of such a large sum of money to carry on the work would prompt the desire to incorporate. In response to Wheelock's request, John Wentworth, Royal Governor of the New Hampshire Province, issued a charter in the name of George III on December 23, 1769.⁴⁴ The charter was granted in spite of the fact that the Earl of Dartmouth and the English Bishops of the Church of England opposed incorporation.⁴⁵

It was this charter which officially created Dartmouth College and provided for its operation and administration.⁴⁶ Its provisions are as clear as

40 Ibid.,

41 Chase, 49.

42 Beveridge, I, 224.

43 Chase, 54-55.

44 Ibid., 90

45 Ibid.,

46 MacLaughlin, Constitutional History, 385.

they are broad. The charter recognizes the personal efforts of Wheelock who, in 1754, "...at his own expense", and "on his own estate and plantation set on foot an Indian Charity School, and for several years, through the assistance of well disposed persons in America, clothed, maintained and educated a number of the children of the Indian natives..."⁴⁷ The charter also provided that:

...the Trustees of said College may and shall be one body corporate and politick in deed, action and name, and shall be called ...by the name of the Trustees of Dartmouth College.⁴⁸

The charter empowered any seven of the twelve Trustees to appoint and remove the president, to fill any vacancy on the Board of Trustees, to make all laws, regulations and rules for the government of the College, and to do anything which they think proper.⁴⁹ Wheelock was made President of the institution, and he was given the power to appoint his successor in his will. Under the charter the power of the Trustees was to last forever.⁵⁰ It is obvious that the charter intended that the school be subject to the absolute and exclusive control of the Board of Trustees. Wheelock assumed the presidency and operated the school until his death in 1779.⁵¹ In his will Wheelock declared that: "I do hereby nominate, constitute, and appoint my said son, John Wheelock, to be my successor in said office of President of my Indian Charity School and

47 Timothy Farrar, Reported the Cases of the Trustees of Dartmouth College against William Woodward, John W. Foster, Portsmouth, New Hampshire 1819, 2.

48 Ibid., 6.

49 Ibid., 11-16.

50 Ibid., 10

51 Ibid., 562.

Dartmouth College, with and into which said school is now incorporated."⁵²

John Wheelock was twenty-five years old at the death of his father, and was an officer in the Revolutionary Army.⁵³ After some insistence on the part of the Trustees,⁵⁴ he accepted the office and applied himself vigorously to the continuation of the noble work his father had begun.

The affairs of the college went along smoothly and prosperously for four years before discord reared its ugly head. It is quite difficult to trace to their sources troubles which beset the College. The troubles began about 1783 and continued to ferment and expand until the case of Dartmouth College vs. Woodward emerged and was presented to the Supreme Court for final resolution. Beveridge, in his searching study of the background of the Dartmouth case, wrote of the beginnings of the controversy that:

They came from sources as strange as human nature itself, and mingled at last into a compound of animosities, prejudices, ambitions, jealousies, as curious as any aggregation of passions ever arranged by the most extravagant novelist.⁵⁵

One of the sources of friction, which writers have reported as a contributory factor to the Dartmouth College controversy, springs from a quarrel between members of the congregation of a church in the town of Hanover, where the College was located.⁵⁶ The quarrel resulted in the complaint to the church by one Rachel Murch that a certain brother Samuel Haze or Hayes had

52 Ibid., 562.

53 Baxter, Perry Smith, History of Dartmouth College, Houghton-Osgood Co. Boston, 1878, 76.

54 Chase, 564.

55 Beveridge, IV, 226.

56 Corwin, Marshall and the Constitution, 155.

brow beaten and insulted her, had accused her of seeking to break up his home, and had said that her soul was, "...as black as Hell."⁵⁷ It seems that factions developed and the quarrel assumed a sectarian complexion. On one side were the Congregationalists and on the other were the Presbyterians and other denominations.⁵⁸ At this time the Congregationalists held a majority and their ministers enjoyed certain privileges, such as exemption from taxation, which were not enjoyed by other denominations.⁵⁹

Perhaps the most important break in the relationship between the heads of Dartmouth College came in 1793 when Nathaniel Niles was elected to the Board of Trustees. From the beginning he and President Wheelock were irreconcilable opponents. Shirley, in his invaluable work treating this case, refers to Niles as an, "...inventor, manufacturer, poet, lawyer, priest, physician, and metaphysician, a man of great and varied powers."⁶⁰ Jefferson said of Niles that "He was the ablest man I ever knew."⁶¹ Wheelock and Niles inherited a bitter antagonism which was rooted in a religious controversy between Niles' theology teacher at Yale and John Wheelock's father.⁶² For some time after 1793, the Board of Trustees had been somewhat divided between the supporters of Wheelock and those members who more or less followed Niles' leadership.⁶³ After the cleavage developed, not a single friend of Wheelock

57 Shirley, 67.

58 Ibid., 69

59 Ibid., 73

60 Ibid., 82

61 Ibid.,

62 Beveridge, IV,

63 Shirley, 85.

was elected to the Board.⁶⁴ In 1809, a staunch and influential member of the Board, who had championed Wheelock's cause, died. This gave the Niles' faction the deciding voice in the Board proceedings. The controversy came to the surface in Wheelock's request to the legislature to investigate the conduct of the College by the Trustees.⁶⁵ Another contributing factor was a pamphlet written by Wheelock attacking the Trustees. The eighty-three page attack, which was published in 1815, set off a series of exchanges between the Trustees and the president's supporters. The factions grew to include the political, religious and personal enemies of both the Wheelock and Trustee group. In a general way it may be said that the Trustees were Congregationalist with regard to religion and Federalist in politics.⁶⁶ Shirley reports that only three out of the many Congregationalist ministers in New Hampshire were Republicans.⁶⁷ Wheelock was a Presbyterian, but his political loyalty was not as obvious. This is true in spite of the fact that it was a Republican administration that made the attack on the Trustees and radically changed the organization of the College. The climax to the Wheelock-Trustee College conflict came on the afternoon of Saturday, August 26, 1815, when the Trustees, acting on a motion introduced by Judge Paine, voted to remove Wheelock from office and promptly elected the Rev. Francis Brown, of Yarmouth, Maine, to succeed him.⁶⁸ This action by the Board of Trustees provoked widespread

64 Ibid.

65 John King Lord, A History of Dartmouth College, The Rumford Press, Concord, New Hampshire, 1913, 589.

66 Shirley, 70.

67 Ibid.

68 Lord, 77-78.

resentment, and feelings were running high both in and out of New Hampshire. These feelings were not unrelated to the keen political competition which was going on between the Federalists and Republicans.

In other pages of this study considerable attention has been given to the growth of the Republican party under Jefferson beginning in 1793. The Republicans had won complete control of the state after 1800, but the Federalists surged back in 1813 and tried to undo the Republican achievements. In the midst of all the indecision, the Federalists came to support the Trustees and the Republicans backed the Wheelock group. Beveridge attempted an explanation of the fundamental issues involved:

In a general, and yet quite definite, way the issue shaped itself into the maintenance of chartered rights and the established religious order, as against reform in college management and the equality of religious sects.⁶⁹

The campaign for the election of 1816 was indeed bitter. It resulted in the election of a Republican administration. William Plumer, who was a Federalist prior to 1808,⁷⁰ was elected governor. In 1816 Plumer was a confirmed Republican and follower of Jefferson. In the election of 1816, the state legislature was given a decisive Republican majority.⁷¹ Having received this mandate from the people, who voted in larger numbers than ever before,⁷² the Republicans proceeded to pass measures which destroyed many of the Federalist accomplishments. Among the important bills which were sent to the legislature were bills to reform the judiciary and to change the management

69 Beveridge, IV, 229.

70 William Plumer, Jr., Life of William Plumer, Phillip Sampson & Co. Boston, 1857, 365.

71 Ibid.

of Dartmouth College from private to public control.⁷³ To secure the passage of the latter act, Governor Plumer appeared before the legislature on June 6, 1816,⁷⁴ and directed the legislature's attention to the condition of Dartmouth College. Addressing the legislature, Plumer said:

Permit me...to invite your consideration to the state and condition of Dartmouth College, the head of our learned institutions. The charter of that college was granted...under the authority of the British King. As it emanated from royalty it contained principles congenial to monarchy,...hostile to the spirit and genius of free government. The college was formed for the public good not the emolument of its trustees; and the right to amend and improve acts of incorporation of this nature has been exercised by all governments both monarchical and republican...facts show that the authority of the legislative to interfere upon the subject; and I trust you will render this important institution more useful to mankind.⁷⁵

The legislature of New Hampshire promptly responded to the governor's urgings. On June 27, 1816 it passed a statute, the constitutionality of which brought the Dartmouth College case before the Supreme Court. The general provisions of the statute may be summarized briefly. The New Hampshire Governor and Council were authorized to appoint a board of twenty-five overseers, which could exercise a veto over the acts of the trustees. The number of Trustees were increased to twenty one, and the Governor and Council were authorized to appoint the additional members. The president of the University was required to make an annual report on the condition of the school to the Governor, and the Governor was to report to the legislature at least once every five years.

73 George Barstow, The History of New Hampshire, Little and Brown, Boston, 1853, 383.

74 Corwin, Marshall and the Constitution, 156.

75 Lord, 396-98.

The name of the College was changed from Dartmouth College to Dartmouth University.⁷⁶

Through this legislative Act of June 27, 1816, the charter was radically altered, and the school, which had been founded with private funds to serve a public cause, was brought under complete state control. It is not difficult to imagine the resentment which the Trustees felt at this action. John Lord Kind has included a copy of the "Remonstrance of the Trustees" in which three of the College Trustees deplored the passage of the bill. They maintained that:

To deprive a Board of Trustees of their Charter rights, after they have been accused of gross misconduct in office, without requiring any proof whatever of such misconduct, appears to your remonstrants unjust, and not conformable to the spirit of the free and happy government under which we live.⁷⁷

Two of the original Trustees and nine of the new trustees of the University met at Hanover and reappointed John Wheelock to the presidency of Dartmouth University.⁷⁸ In response to this action and the act of the legislature entitled, "An Act to Amend the Charter and Enlarge and Improve the Corporation of Dartmouth College," the original Trustees of the College drew up a set of resolutions in which they explicitly stated their refusal to abide by the act of the legislature,⁷⁹ which they considered unjust and unconstitutional.⁸⁰

76 See Shirley, 18-25 for copies of the Act of June 27, 1816, and the two subsequent and related acts of December 18 and 26.

77 Lord, 676.

78 Barstow, 400.

79 Lord, 695.

80 Barstow, 398.

They held that:

If the act..has its intended operation and effect every literary institution will hereafter hold its rights, privileges and property, not according to the settled established principles of law, but according to the arbitrary will and pleasure of every successive legislature.⁸¹

In view of the open refusal of the old Trustees to withdraw, a very confused situation developed. The Trustees of the College and those of the University endeavored to operate the same school.⁸² In December, 1816 the legislature passed two laws which levied five hundred dollars fines for each offense by those persons who acted for the school except as provided in the laws of the state.⁸³ The faculty, students and the public became divided in their loyalties. The original Trustees were ousted from the buildings but retained the larger student following in their new Rowley Hall quarters.⁸⁴ Seeing their chartered rights, privileges and immunities being destroyed on every hand, the Trustees looked about for some means of redress. Prompted by the advice of friends and lawyers, they resolved to apply to the courts for relief. Three of the most able lawyers and politicians in all New England were retained as counsel for the College. They were: Jeremiah Mason, Jeremiah Smith and Daniel Webster.⁸⁵

In order to pave the road for legal action, the Trustees of the College

81 Lord, 693.

82 Barstow, 398.

83 Farrar, 23-25.

84 Lord, 115-121.

85 Ibid., 91

on August 27, 1816 removed William H. Woodard from office which he had held for many years as Secretary and Treasurer of the College.⁸⁶ Woodard had allied himself with the Wheelock faction and had refused to cooperate with the College Trustees. On February 8, 1817 the College Trustees brought an action of trover against Woodard to recover the charter, seal and records of the College which were in his custody. The total value of the property was said to be fifty thousand dollars.⁸⁷ The suit was instituted in the Court of Common Pleas of Grafton County in February, 1817. Through an agreement between both parties in the litigation, the pleas were filed and the case was carried before the Superior Court on appeal.⁸⁸ The case came before the Superior Court of New Hampshire in May, 1817. All former pleas were waived and the facts, as they were agreed upon by the contending parties, were drawn up by a jury in the form of a special verdict and presented to the judges of the court for argument and judgement.⁸⁹

While the counsel for the University, George Sullivan and Ichabod Bartlett, were able men, Beveridge was positive that they were decidedly inferior to the College lawyers.⁹⁰ Three Republicans sat on the bench of the Superior Court as judges. They were Chief Justice William M. Richardson and associate justices Samuel Bell and Levi Woodbury.⁹¹

While some consideration of the able arguments by Mason, Smith and Webster is of value here, the temptation to deal too lengthily with them must

86 Shirley, 116

87 Farrar, 1

88 Ibid., 2.

89 Ibid., 1.

90 Beveridge, IV, 234.

91 Farrar, 28.

be resisted. All of the arguments were interesting; yet, none of them relied on the principle Marshall employed in deciding the case. This does not mean that the corporation counsel did not hold the acts of the legislature, under which Woodard withheld the College property, as being violative of Article I Section 10 of the Constitution. Mason opened the argument for the Trustees and sought to establish three propositions which supported the unconstitutionality of the statutes in question. These points were: that the acts passed were without the bounds of legislative authority; that they violated certain provisions of the New Hampshire constitution which restrained the legislature; and that the acts violated the Constitution of the United States.⁹² In a compact argument Mason denied the right of the legislature to deprive the Trustees of their prerogatives under the charter without their consent. He concluded his argument by citing Marshall in *Fletcher vs. Peck* and *New Jersey vs. Wilson* in support of his argument that the acts impaired the obligation of contract and therefore violated the Constitution.⁹³ Jeremiah Smith in an extended argument sought to establish as inviolate, the rights of private corporations as provided in its charter. Webster's argument, before the state court was equally impressive. However, since his argument before Marshall is mainly an extension of the ones made in the Superior Court, consideration of it will be postponed.

The able arguments of the plaintiffs' counsel notwithstanding, the Superior Court of New Hampshire ruled against the College Trustees. The

92 Ibid., 32-33.

93 Ibid., 65-67.

opinion of the court was given by Chief Justice Richardson, and it was as persuasive as it was interesting and able. The foundation upon which the court rested its decision was the assumption that the corporation created by the charter was a public corporation and as such was subject to the control of the legislature. Richardson said that the public nature of the corporation which the charter created was obvious; because, "...it does not appear that Dartmouth College was subject to any private visitation whatsoever."⁹⁴ The Chief Justice then sets out to establish this basic premise:

Who has any private interest either in the object or the property of this institution? If all the property were destroyed it would be exclusively public and no private loss....The office of Trustee of Dartmouth College is, in fact, a public trust, as much as the office of governor or judge of this court. It therefore seems to us, that if such a corporation is not to be considered as a public corporation, it would be difficult to find one that could be so considered.⁹⁵

Pursuant to this line of reasoning Richardson decides that the acts of the legislature were valid, binding on the Trustees, and were not violative of the Constitution of the United States. He did, however, in the concluding sentences of his opinion express the consolation which he and the judges took in the knowledge that, "...our mistakes can be corrected, and be prevented from working any attainable injustice."⁹⁶

The Trustees lost no time in suing on a writ of error to bring the case before the United States Supreme Court. The Court agreed to hear the case.

94 Ibid.

95 Ibid., 213-15

96 Ibid., 234.

Arguments began on March 10, 1818 with Chief Justice Marshall and Associate Justices, Bushrod Washington, William Johnson, Brockholst Livingston, Thomas Todd, Gabriel Duvall, and Joseph Story constituting the Court.⁹⁷

When the case of Dartmouth College vs. Woodward appeared before the Supreme Court, the number of counsel for the Trustees had been reduced, although the legal power was increased.⁹⁸ John Hopkinson of the Philadelphia bar had joined Webster in the advocacy of the College's cause. Warren reveals that the Trustees had considered employing the talented Luther Martin to work with Webster.⁹⁹ Beveridge expresses the opinion that Hopkinson was probably chosen by the Trustees because of his brilliant defence of Samuel Chase, as well as for the high estimate of his ability held by John Marshall.¹⁰⁰ Dartmouth University employed John Holmes, a congressman from Maine, who, "...was notoriously unfitted to argue a legal question of any weight in any court."¹⁰¹ With Holmes for the University was William Wirt, the United States Attorney-General. Wirt was indeed an able lawyer, but the assumption of his duties as Attorney-General had overworked him to the point where he was unable to sufficiently prepare himself to argue the case. He wrote to a friend that: "The Supreme Court is approaching. It will half kill you to hear that it will find me unprepared."¹⁰² Lord points out that the University seemed so

97 Ibid., 237.

98 Beveridge, IV, 237-238.

99 Charles Warren, "Historical Notes on the Dartmouth College Case," American Law Review, 1912, XLVI, 665.

100 Beveridge, IV, 238.

101 Ibid., 239.

102 William Wirt, Joseph P. Kennedy, Editor, Memoirs of the Life of William Wirt, Lea and Blanchard, Philadelphia, 1849, I, 73-74.

confident of victory that it was regarded as unnecessary expense to send the counsel who had argued the case in the state court to Washington.

Before a small and half-interested audience in the small basement room of the Capitol on March 10, 1818, the great Daniel Webster opened the argument for the plaintiffs in error.¹⁰³ As Corwin observed, Webster has been crowned by tradition as the central figure of the litigation, although he did not contribute much of the legal weight to the decision which Marshall rendered.¹⁰⁴ Indeed, the far greater part of his argument was devoted to a restatement of Mason's and Smith's argument before the Superior Court of New Hampshire.¹⁰⁵ At the very outset Webster stated the main question. It was whether or not the acts of the legislature of June 27, December 16, and December 26, which radically altered the chartered rights of the Trustees, were binding on them without their consent. He then made a blanket statement of the substance of the facts in the case. He conceived that Wheelock had set up a private charity which, in order to perpetuate, he had incorporated under the name of the Trustees of Dartmouth College. The great orator then proceeded to show how the Trustees had been granted exclusive authority over the property and administration of this private charity. He charged that the acts of the legislature had created a new corporation and vested it with the powers and privileges of the original. Webster stated that:

If either as a corporation or as individuals
they have any legal rights, this forcible intrusion

103 Rufus Choate,

104 Corwin, Marshall and the Constitution, 162.

105 Ibid., 102.

of others violates those rights, as manifestly as an entire and complete ouster and disposition.¹⁰⁶

In support of his argument that the acts in question amounted to an impairment of the obligation of contract, Webster cites James Madison in the Federalist and Marshall's opinion in two previous cases. After what appears to have been a very casual consideration of the New Hampshire acts as infractions of the federal contract clause, Webster continues a comparatively short argument:

The case before the court is not of everyday occurrence. It affects not this college only, but every college, and all the literary institutions of the country. They all have a common principle of existence, the inviolability of their charters. It will be a dangerous...experiment to hold these institutions subject to the rise and fall of popular parties, and the fluctuations of political opinions. If the franchise may be at any time taken away and its use perverted, benefactors will have no certainty of effecting the objects of their bounty. ...College halls will be deserted by all bolder spirits, and become a theater for the contention of politics. Party faction will be cherished in the places consecrated to piety and learning. It is here that these rights are to be maintained, or they are prostrated forever.¹⁰⁷

It is discernible now that Webster relied mainly on "abstract justice."¹⁰⁸

He concentrated on showing that if such a power to alter contracts was lodged anywhere, it was in the courts, not the legislature.¹⁰⁹ In this wise he held that the acts violated the principle of separation of powers. Webster's three final sentences were in Latin, and were doubtless an impressive climax

106 4 Wheaton, 555-56.

107 Ibid., 598-99.

108 Beveridge, IV, 244.

109 Ibid.

to his argument in spite of the fact that the Chief Justice probably did not understand a word of Latin.¹¹⁰

Any account of Webster's argument in this case is incomplete without some reference to the unsubstantiated story credited to Professor C. A. Goodrich of Yale University. The story describes a dramatic appeal Webster is alleged to have made at the close of his argument. Goodrich first told the story to Rufus Choate in 1853, and it was repeated in Curtis' work on Webster.¹¹¹

Holmes spoke after Webster, and in view of the estimate given of his abilities, it is not surprising that his argument was neither eloquent nor logical. Corwin observes that it was a poor strategy which placed him before Marshall to argue such a question.¹¹² With regard to the argument made by William Wirt, whose unpreparedness has been noted, Webster wrote to Jeremiah Mason on March 13, 1818 that: "He seemed to treat this case as if his side

111 According to Goodrich, Webster paused near the close of his speech in the grips of profound emotion. The courtroom was silent, and all eyes were intent on Webster's striking figure. After some moments he raised his eyes to Marshall and said: "This Sir is my case. It is the case...of every college in our land. Sir, you may destroy this little institution...you may put it out. But if you do you must carry through your work! You must extinguish...all those greater lights of science, which, for more than a century have thrown their radiance over our land. It is Sir...a small college. And yet, there are those who love it. Here the...feeling...broke forth, his lips quivered; his firm cheeks trembled with emotion, his eyes filled with tears....Chief Justice Marshall...bent over,..and his eyes suffused with tears....There was not one among the strong minded men of that assembly who could think it unmanly to weep, when he saw standing before him the man who had made such an argument melted into the tenderness of a child. Mr. Webster...recovered his composure and said..."Sir, I know not how others may feel...but for myself, when I see my Alma Mater surrounded, like Caesar in the Senate house, by those who are reiterating stab after stab, I would not, for my right hand, have her turn to me and say....And thou, too, my Son.'" George T. Curtis, Life of Daniel Webster, D. Appleton and Co. New York, 1870, I, 169-171.

112 Corwin, Marshall and the Constitution, 163.

could furnish nothing but declamation."¹¹³

In terms of the amount and weight of argument devoted to the single constitutional question before the Court, Webster's colleague, John Hopkinson, made the greater contribution. Hopkinson too, however, failed to treat the question of the state acts of violations of the contract clause of the Constitution with the intensiveness which the question merited. Hopkinson opened his argument by stating his main objective. It was to refute the fallacious claims of the counsel for the defendant, Woodard.¹¹⁴ Wirt had concluded his argument feeling that he had established the corporation as a public, not a private institution.¹¹⁵ Wirt had recalled the fact that the framers of the Constitution had inserted the contract clause with a view to protect private not public corporations like the Trustees of Dartmouth College.¹¹⁶ Hopkinson on behalf of the Trustees endeavored to destroy Wirt's argument and bring the charter under the scope of the contract clause of the Constitution by shewing the corporation to be a private institution. Attacking the argument made in the lower court that the officers of the College were public officers, Hopkinson argued lucidly, compactly, and convincingly.

Public offices are not created by contract or charter. They are provided for by general laws. Judges and magistrates do not hold their offices under charters. These offices are created for public purposes, and filled by appointments made in the exercise of political powers.¹¹⁷

113 Daniel Webster, Fletcher Webster, Editor, The Private Correspondence of Daniel Webster, Little, Brown & Co., Boston, 1857, I, 275.

114 Farrar, 295.

115 Ibid., 290.

116 Ibid., 289

117 4 Wheaton, 616.

Hopkinson here recalls the attitude of the lower court on this question of the public or private nature of the corporation.

The idea that this is a public corporation was taken in the court below. The decision was founded on it...It is relied on here, and yet all the reasoning and every decided case refutes the argument. The hospital of Pennsylvania is quite as much a public corporation as this college. It has great funds, most wisely and beneficently administered. Is it to be supposed that the legislature might rightfully lay hands on this institution, violate its charter and direct its funds to any purpose which its pleasure might prescribe? The property of this college was private before the charter; and the charter has wrought no change in the nature of title of this property.¹¹⁸

It may be seen that Hopkinson sought to establish the private character of the corporation so as to bring the acts of the legislature more indisputably under the contract clause of the Constitution. In view of the cogency and strength of his argument, perhaps some reference should be made to the poise, grace, and air of distinction with which he moved and spoke.¹¹⁹ Webster had promised that Hopkinson would do all that was humanly possible.¹²⁰ Rufus Choate referred to the, "...ripe and beautiful culture of Hopkinson."¹²¹ Hopkinson's speech concluded the arguments.

On the morning of March 13, 1818 the Chief Justice announced that some of the judges were of different opinions and some had formed no opinions.¹²²

118 Ibid., 617-618.

119 Beveridge, IV, 254.

120 Daniel Webster, Claude H. Van Tyne, Editor, Letters of Daniel Webster, McClure, Phillips & Co., New York, 1902, 75-6.

121 Samuel Brown, Life of Rufus Choate, Boston, 1870, I, 514.

122 Beveridge, IV, 255.

The case was continued and the Court adjourned the following day. The litigants were forced to wait until the second Monday in February, 1819 for the decision of the Court.

Between March 13, 1818 and February 1, 1819 the College Trustees who seemed more doubtful, sought to determine and influence the opinions of the Justices.¹²³ Perhaps the most significant development was the influence which Chancellor Kent's opinion as to the constitutionality of the acts is supposed to have exerted on the undecided Justice Todd Johnson. Johnson is reported to have talked with the highly respected New York jurist. Kent told him that he felt the acts to be violative of the contract clause.¹²⁴ Meanwhile the University had not gone unimpressed with Webster's and Hopkinson's brilliant arguments. William Pinckney, truly a giant at the American bar, was retained to move for a reargument and to exert his talents on behalf of Woodward and the Republican administration of the state of New Hampshire.¹²⁵

While Marshall's opinions in the cases of Fletcher vs. Peck and New Jersey vs. Wilson are indicative of his general disposition on the main issue involved, the College case presented the Court with at least one unique and difficult question to resolve. Marshall's final judgment turned on four general premises. They were: that the College was a private eleemosynary institution; that the charter was the outgrowth of a contract between the donors and the King of England; that the Trustees represent the interest of

123 Corwin, Marshall and the Constitution, 164.

124 Shirley, 253.

125 Corwin, Marshall and the Constitution, 165.

the donors, and were entitled to the privileges of same; and, finally, that the contract clause of the Constitution was broad enough in scope to reach and protect a representative interest such as the Trustees constituted.

In setting forth his first proposition Marshall describes the College and declares it to be a private, not a public institution.

From this review of the charter it appears that Dartmouth College is an eleemosynary institution ...that its trustees or governors were originally named by the founder and invested with the power of perpetuating themselves; that they are not public officers, nor is it a civil institution, particularly in the administration of government.¹²⁶

Logically the next question is whether or not a contract is involved in this litigation. With characteristic precision and directness, Marshall attacks the problem:

It can require no argument to prove that the circumstances of this case constitute a contract. An application is made to the crown for a charter to incorporate a religious institution. In the application it is stated that large corporations have made for the object, which will be conferred in the corporation as soon as it is created, the charter is granted, and on its faith property is conveyed. Surely in this transaction there is every ingredient of a complete and legitimate contract is to be found.¹²⁷

It was necessary to decide on the status of the original Trustees whose rights were derived from the original contract. Marshall seeks to establish that the Trustees have succeeded to the rights and powers of the original donors.

126 McLain, Cases, 1007.

127 Thayer, Cases, II, 1565.

The founders of the college, at least those whose contributions were in money, have parted with the property bestowed upon it, and their representatives have no interest in that property. The donors of the land are equally without interest so long as the corporation shall exist. An artificial, mature being was created by the crown, capable of receiving and distributing forever, according to the will of the donors of the donations which should be made to it. They the donors represented by the corporation. The corporation is the assignee of their rights, stands in their place, and distributes their bounty, as they would themselves have distributed it, if they had been immortal.¹²⁸

Thus Marshall shows that the Trustees of Dartmouth College constitute the corporation and have a legal representative interest under the contract.

This reasoning brings the Chief Justice to his most difficult problem. It is a difficulty which none of the counsel anticipated. It remained to Marshall's ingenuity to resolve it. Did the contract clause of the Constitution operate exclusively to the protection of parties who have a beneficial interest under a private contract? Were the rights of the Trustees, whose interest was clearly representative, secured from legislative alteration by the Constitution? Marshall dwells on the problem.

The trustees alone complain and the trustees have no beneficial interest to protect. Can this be such a contract as the Constitution intended to draw from the power of the State Legislature? Contracts, the parties to which have a vested beneficial interest, and those only, it has been said, are the objects about which a Constitution is solicitous and to which protection is extended.¹²⁹

128 4 Wheaton, 641.

129 Thayer, II, 1572.

With characteristic logic, Marshall sets himself to the task of bringing the representative contracted interests of the Trustees under the guardianship of the Constitution.

This is plainly a contract to which the donors, the trustees, and the Crown (to whose rights and obligations New Hampshire succeeds) were the original parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract on the faith of which real and personal estates has been conveyed to the corporation. It is then a contract within the letter of the Contract and within its spirit also, unless the fact that the property is invested by the donors in the Trustees for the promotion of religion and education...shall create a particular exception taking this case out of the prohibition contained in the Constitution. On what safe and intelligible ground can this exception stand? The case being within the words of the rule, must be within its operation likewise....¹³⁰

One further question remained before the conclusion could be stated. Do the acts of the New Hampshire legislature impair the obligations under the contract of the College corporation? The Court answers positively and affirmatively. Marshall had shown: that the College was a private eleemosynary institution; that the charter was a legitimate contract; that the Trustees were original parties who possessed a representative interest; that the contract clause of the Constitution operated to protect such representative interests secured under a legitimate contract; and that the acts of the state legislature did impair the private corporation's contract. According to the reasoning on this point, the Court could not fail and did declare the acts void, and reversed

130 Ibid., 1574.

the judgement of the New Hampshire court in favor of the plaintiffs in error.¹³¹
 Justices Story and Washington rendered concurring opinions, and Justice Duvall
 dissented.¹³²

On August 21, 1819, Story wrote to Chancellor that:

...the principles upon which that decision rests
 will be found to apply with an extensive reach to
 the great concerns of the people and will check any
 undue encroachment upon civil rights, which the
 passions or the popular doctrines of the day may
 stimulate our State legislatures to adopt.¹³³

Charles Warren has written a valuable article in the Harvard Law Review
 which brings out some of the reactions to the decision throughout the country.
 The author shows that in New England the reaction was divided along party lines.
 The Federalists supported the decision and the Republicans deplored it. The
New Hampshire Gazette, a Republican paper, took the following attitude: "Had
 the case been fairly laid before the court, no man, without impeaching their
 integrity or their common sense, can doubt but that their decision would have
 confirmed that of the Superior Court in this state."¹³⁴ The Portsmouth Oracle
 expressed the Federalist view and was lavish in its praise of the decision.¹³⁵
 In January 1820 a review of the decision appeared in the North American Review.
 The article said of the case that: "Perhaps no judicial proceedings in this
 country ever involved more important consequences or excited a deeper interest
 in the public mind than the case of Dartmouth College, recently determined."¹³⁶

131 Ibid., 1579.

132 Wheaton, 666-713.

133 Joseph Story, William Story, Editor, Life and Letters of Joseph Story,
 C.C. Little and J. Brown, Boston, 1851, I, 331.

134 Warren, "A Historical Note the Dartmouth College Case", 675.

135 Ibid.

136 Ibid.

James C. Jenkins' article is interesting for the authors' argument in favor of the recall or overrule of the opinion in the College case. Jenkins feels that the doctrine of state sovereignty is excessively trampled by the doctrine in the decision. The practice of inserting reservations in the contracts between states and corporations, through which the states retain the right of repeal, does not satisfy Jenkins that the decision has been sufficiently altered. He says: "...a reservation clause does not entirely neutralize the effect of the charter contract theory; hence the importance of a direct recall of the college decision."¹³⁷ Jenkins then expresses the view that:

...it is immaterial whether the charter creates a public private corporation, or contains or does not contain a reservation of the right to amend or recall, insofar as it effects the power of Parliament, or its successor in sovereignty, the legislature. The legislature has the same power to amend that it would if a reservation had been inserted in the charter.¹³⁸

Sir Henry Maine in one of his four essays on popular government is generous in his praise of the Dartmouth College decision which was founded on a literal interpretation of the contract clause. He wrote of the principle that: "I have seen the rule which denies to the several states the power to make any laws impairing the obligations of contracts criticised as if it were a mere politic-economic flourish; but in point of fact there is no more important provision in the whole Constitution."¹³⁹ Thomas M. Cooley, a distinguished jurist and writer on American constitutional law, takes the directly opposite

137 James C. Jenkins, "Should the Dartmouth College Decision be Recalled", American Law Review, 1917, LI, 750.

138 Ibid., 749-750.

139 Sir Henry J.S. Maine, Popular Government, London, 1885, 247.

view.

It is under the protection of the decision in the Dartmouth College Case that the most enormous and threatening powers in our country have been created; some of the great and wealthy corporations actually having greater influence in the country, at large, and upon the legislation of the country, than States to which they owe their existence.¹⁴⁰

Listed among those who deplore the doctrine of the case is Hare. Regretting the deprivation of state sovereignty resulting from the decision, Hare declares that only the doctrine of the "police power" of the state has operated to counteract the trend.¹⁴¹ He states that a contract is founded on the right to alienate and convey, but denies the applicability of the principle where the legislature is the grantor. "Such a grant is a law as well as a contract, and therefore subject to modification or repeal; and viewed merely as a contract, relates to matters which are public and cannot be vested in any individual."¹⁴² A better conception of the full extent which the historian felt that the College case doctrine had undermined the sovereignty of the states may be gotten from the following statement.

The state was stripped under this interpretation of Prerogatives that are commonly regarded as inseparable from sovereignty, and might have stood, like Lear, destitute before her offspring, had not the police been dexterously declared paramount, and used as a means of rescinding improvident grants.¹⁴³

Charles Doe asserts that a corporate charter is not a contract as conceived in the Constitution, and that both the state court and the Supreme Court erred

140 Thomas M. Cooley, A Treatise on Constitutional Limitations, V.H. Lane, Boston, 1903, 335.

141 John Innes Clarke Hare, American Constitutional Law, Little, Brown and Co., Boston, 1889, I, 606.

142 Ibid., 607.

143 Ibid.

in their judgment.¹⁴⁴ Doe states his belief that the repeal of the charter by the legislature did not divert the College from serving the purpose for which it was intended.¹⁴⁵

It is enevitable that such an important pronouncement would be followed by affirmation and dissent. The effect of the case as a stimulant to the protection of corporate security, especially of eleemosynary institutions, is undeniable. The following statement by Alfred Russell in his article seems quite balanced.

"...respect to corporations, the historical interest of the College is greater than its practical importance. No charter has been granted during the present generation without reservation of the repealing power...interpreted...with extreme liberality.¹⁴⁶

Russell expresses the following view in opposition to the recall of the opinion or the destruction of the contract clause by constitutional amendment.

It is idle to suggest abrogating the contract clause by constitutional amendment, or to suggest reversal of the case. Neither could ever be done. Nor is either amendment or reversal desirable or demanded by public opinion. What public opinion demands is just what it is getting, namely, the progressive modification of the doctrine of the case to suit altered circumstances of the country; looking both to property rights and to the general good.¹⁴⁷

144 Charles Doe, "Dartmouth College Case", Harvard Law Review, 1892-93, VI, 162.

145 Ibid.

146 Alfred Russell, "Status and Tendencies of the Dartmouth College Case", American Law Review, 1896, XXX, 356.

147 Ibid.

CHAPTER V

MCCULLOCH vs. MARYLAND

From that class of John Marshall's opinions which expounds the relations between the state and national governments, the case of McCulloch vs. Maryland¹ has been selected. The issue provoking the litigation was rooted in the dual nature of the American political fabric. Fundamentally the question was of state sovereignty against nationalism or federalization. During the first generation of national existence, two important political trends were in operation. One was devoted to the successful institution of a limited national government.² The second trend was concerned with the completion of nationality and the practical as well as theoretical formation of a federated state.³ The latter trend did not achieve its goal during the first three decades. Indeed, the problems which were produced by the conflicting assertions of state and national authority engrossed the minds and energies of men for fully three quarters of a century or almost one half of the nation's life. The issue was not settled by presidential proclamation. Neither was a learned decision by the Supreme Court of the land adequate to quiet the seethings and strivings of the proponents of state sovereignty and localism. It remained for Generals Grant and Lee at Appomattox to finally effect the resolution of this

1 4 Wheaton, 316.

2 McLaughlin, Constitutional History, 5.

3 Ibid., 1.

most dominant of national problems. John Marshall's decision in the case of *McCulloch vs. Maryland* in 1819 is vastly important for his construction of the Constitution as an ordinance of nationality".

In asserting the constitutional supremacy of the national government over the state authority, Marshall helped to pave the road which leads to an integrated and stabilized national economy as well as cultural and political unity. In the years after 1819 friends of the union were able to turn to Marshall's decisions for sound constitutional principles and weapons with which to beat back the surge of state sovereignty and particularism, which threatened to destroy the union. Chancellor Kent wrote of *McCulloch vs. Maryland* that:

A case could not be selected from the decisions of the Supreme Court superior to this one of *McCulloch vs. the State of Maryland*, for the clear and satisfactory manner in which the supremacy of the laws of the union have been maintained by the Court, and an undue assertion of State power overruled and defeated.⁴

If a full and satisfying comprehension of Marshall's opinion in *McCulloch vs. Maryland* and its consequences are to be realized, some attention must be given to economic conditions in the United States from 1811 to 1819. The War of 1812 and other important political and social developments occurred during this period, but the main difficulties stemmed from chaotic banking and currency conditions. The collapse of sound and orderly banking methods was followed by the national government's efforts to bring order and stability.

4 Kent, I, 427.

The restraint imposed by an instrumentality of the national government was resented by the states. The national agency employed to stabilize the national financial situation was the second Bank of the United States. The state of Maryland challenged the existence and operation of the Bank and sought to employ its sovereign power of taxation as a means of destroying the institution. A brief review of the factors prompting the chartering of the Bank, its operations and consequences seems appropriate.

In 1791 Congress passed a bill incorporating the first Bank of the United States and George Washington, after careful deliberation signed it into law. Alexander Hamilton, more than any other individual, deserves credit for the establishment of the first Bank.⁵ In 1789 scarcely any phrase of the economic life of the country had reached an appreciable state of maturity. Agriculture was the principle occupation of most of the American people. However, Hamilton, in his Report on Manufacturers, noted that in seventeen different fields of manufacturing, rapid strides had been made.⁶ "The value of imports at this time was about \$20,000,000 and that of exports probably about the same."⁷ The means of transportation were woefully inadequate and undeveloped. The evidences of sectionalism were already apparent. The South had begun the development of an economy supported by the institution of slavery. New York and the New England states were inclined toward commerce.

5 4 Wheaton, 323.

6 Davis R. Dewey, Financial History of the United States, Longmans, Green and Co., New York, 1924, 77-78.

7 Ibid., 79.

Pennsylvania was beginning to sense the possibilities in manufacturing.⁸ The consequences of the above economic tendencies and other factors presented the government of the new Republic with urgent financial problems. Among these were: the need for additional revenue, the need for an effective agency for the administration of the nation's credit, and the problem of satisfying the nation's creditors.

As Secretary of the Treasury, Alexander Hamilton applied himself to the solution of the major financial problems. He suggested three projects: the funding plan, the assumption of the state debt and the creation of a national bank. After overcoming much opposition, Hamilton's plan to incorporate a national bank was accepted. The opposition to the bank project was largely provided by Jefferson and Madison. President Washington took careful note of the attitude of the members of his cabinet toward the proposed bank. Jefferson believed the bank to be unconstitutional. He held that it was not among the powers delegated the national government, and that the bank was nonessential to the execution of the federal government's main powers.⁹ In Congress the debate revolved around the objection to the monopolistic character of the proposed institution and its unconstitutionality.¹⁰ James Madison led the debate against the incorporation of the bank and his objections were much like those of Jefferson.¹¹ In spite of the able and vigorous opposition to the

8 Ibid.

9 Jefferson, Works, (Ford, Editor), VI, 198.

10 Dewey, 99.

11 Annals of Congress, 1st Congress, 1st Session, 1944-52.

bank, Hamilton, in an able paper,¹² was able to uphold the merits of the proposal and convince Washington of its desirability. The bill incorporating the bank was passed and Washington signed it into law in 1791. The charter provided for a capitalization of ten million dollars and was to operate for twenty years.¹³

The charter of the first Bank was to expire in 1811. Extended and intense opposition to its renewal was shown. Financial writers seem to regard with general approval the work of the first Bank. Sumner writes that the Bank, "...was soberly managed, successful, and beneficial in restraining the issues of the smaller banks."¹⁴ Sumner credits the formation of the strong party that opposed the Bank to the restraint which the Bank had exercised on the small banks.¹⁵ Catterall writes that constitutional scruples and hostility to the Secretary of Treasury, Gallatin, motivated Congress in its refusal to renew the Bank's charter.¹⁶ The influence of the private state banks on the state legislatures and the instructions sent by the legislatures to their respective congressmen were no small factors in the defeat of the Bank.¹⁷ The fact that most of the stock of the Bank was owned by English capitalists also engendered bitter opposition.¹⁸ In addition to the great influence which the state banks exercised on the legislatures,¹⁹ their control of local newspapers enabled

12 Hamilton, Works, (Lodge, Editor), III, 445-493.

13 Dewey, 100.

14 William G. Sumner, A History of American Currency, Henry Holt and Co., New York, 1874, 63.

15 Ibid.

16 Ralph C.H. Catterall, The Second Bank of the United States, University of Chicago Press, Chicago, 1903, I.

17 Adams, History of the United States, V, 328.

18 Ibid.

19 Timothy Pitkin, A Statistical View of the Commerce of the United States, James, Eastburn and Co., New York, 1817, 422.

them to circulate large quantities of anti-Bank propaganda.²⁰ The desire of the local bankers to exploit and their objection to the steady influence of the national Bank, prompted Senator Crawford, in his speech for the renewal of the Bank's charter, to charge the state banks and legislatures with avariciousness.²¹ However, the efforts of Senator Crawford and others were not sufficient to save the first Bank.

Coming as it did on the threshold of the War of 1812, the defeat of the Bank was most unfortunate. From the time when the defeat of the Bank appeared likely, large numbers of potential bankers began to exert themselves to secure charters for new state banks. The creation of new banks could only foreshadow more speculation and instability of currency. The need in 1811 was not for more banks. The need was for better banks that employed sounder and fairer principles in the conduct of their business. John Adams, after viewing economic conditions in 1810, wrote that: "Our whole system of Banks is a violation of every honest principle of Banks."²² Branding banks that issued paper money at an interest as pickpockets and robbers, Adams predicted the growth of a banking aristocracy which could be suppressed by no force weaker than Roman Legions.²³ After Congress refused to renew the Bank's charter, banking became a mania. In 1811 there were 88 banks in the country.²⁴ By 1816 the number had increased to 246.²⁵ The greed of local bankers and speculators, the un-

20 Ibid.

21 Annals of Congress, 11th Congress, 3rd Session, 145.

22 John Adams, Old Family Letters, L. B. Lippincott and Co., Philadelphia, 1892, 272.

23 Ibid.

24 Dewey, 144.

25 Ibid.

reasonable demands of debtors for more and more money, and the war needs of the national government combined to smooth the road leading to the ruin of legitimate business and the impoverishment and bankruptcy of hundreds of thousands of ordinary people.²⁶ The United States Treasury's urgent need for cash and credit led to the over-expansion of the notes of local banks. The Treasurer of the national government was forced to exchange fairly sound six percent government bonds for the notes of state banks, twenty one of which had become the sole depositories of government funds after the destruction of the National Bank.²⁷ After discounting and other adjustments were completed, the government suffered a loss of five million dollars.²⁸ The worthlessness of the state bank notes was due to the unscrupulous and unsound banking methods which the local institutions employed. After the disappearance of the National Bank, the state banks were free to issue bills and notes without restraint as to the amount or security of the notes. McMaster goes to great lengths to show the abuses and dishonest operation of local banking institutions. He charges them with hindering the transfer of money from one section of a state to another, and the obstruction of internal commerce. Moreover, McMaster states that the state banks, "...enabled the unprincipled speculator to so steep the industrious honest, and unsuspecting part of the community in debt by means of borrowed notes and indorsements, as to secure its property at sheriffs' sales. Hardly a fraud of any kind could be mentioned of which the banks had not been guilty."²⁹ While the New England area enjoyed a measure of comparative

26 Beveridge, IV, 177.

27 Dewey, 128.

28 Ibid., 145.

29 McMaster, IV, 486.

stability,³⁰ "...from New York and Pennsylvania westward to the Mississippi and southward to Tennessee a state of general bankruptcy prevailed.³¹ In spite of the uncommon care with which the New England institutions were conducted, John Adams was able to write one year after the fall of the first Bank that:

The Profits of our Banks, to the advantage of the few, at the loss of the many, are such an enormous fraud and oppression as no other nation ever invented or endured. If Rumour speaks the Truth Boston has and will emulate Philadelphia in her Proportion of Bankruptcies.³²

Emigration and speculation in the West had already incited a banking mania. Many of the western state banks had issued five times as much as they could possibly redeem.³³ Drastic depreciation in money values was followed by a disruption of commerce and, finally, bankruptcy. At Carlisle in Pennsylvania, "...the sheriff advertised twenty-seven tracts of land for sale at one time. The owner of each one of them was in debt to the banks."³⁴ William Faux, in a journal of his travels through the West, shows that the people were not to be absolved of responsibility for the state of things. The more money they saw, the more they wanted. At Vincennes, Indiana, Faux was required to surrender a twenty dollar bank note from the bank of Harmony, Pennsylvania for five dollars.³⁵ In addition to unreasonable declines in the value of bank notes, the suspension of specie payment, constant changes in the exchange rates, and

30 Beveridge, IV, 178.

31 McMaster IV, 487

32 Adams, Old Family Letters, 299.

33 McMaster, IV, 487

34 Ibid.

35 Reuben G. Thwaites, Editor, Early Western Travels, A.H. Clarke Co. Cleveland 1904-7, XI, 207.

the continuance of the war, imperiled the national financial statement. The government could only negotiate loans and collect public taxes with considerable delay, difficulty and loss. Representative Hanson, from the floor of the House on November 28, 1814, stated that the State Department was without sufficient funds with which to purchase stationery.³⁶

In 1814 the Republican Administration under James Madison was unable to withstand the widespread resentment and valid objections to the practices of the local banks. In spite of its traditional strict constructionist views, the administration selected John C. Calhoun to champion its bill for the establishment of a national bank.³⁷ The first bill was defeated in Congress. Madison vetoed the second bill, feeling it to be inadequate for its purposes. However, a bill establishing a second Bank was passed and became law on April 10, 1816,³⁸ two years after Madison set out to resurrect the Bank. The bill incorporating the Bank was not adopted without a bitter congressional debate, which pivoted mainly on the question of the corporation's constitutionality.

The Bank that was finally incorporated was patterned after the old Bank. Perhaps the Republicans took some consolation in the fact that it was to be administered by Republicans. Madison promptly proceeded to appoint all its government directors from the ranks of the Republican party.³⁹ Madison and Dallas were successful in their efforts to elect William Jones, a Republican politician, as president of the Bank.⁴⁰ The subscriptions to the capital

36 Catterall, 6.

37 Ibid., 11.

38 Annals of Congress, 14th Congress, 1st Session, 280-281.

39 Catterall, 22

40 Ibid.

stock of the Bank were begun on the first Monday in July, 1816. They were conducted in twenty different places for twenty days. When a balance of three million dollars was left unsubscribed, Stephen Girard relieved Madison and the Secretary of the Treasury by subscribing for the entire amount.⁴¹ After the capital had been raised and the organization of the corporation completed, the second Bank of the United States was ready for business.

The first problem encountered by the Bank was the refusal of the state banks to comply with Webster's joint resolution that banks resume the payment of all notes to the government in gold and silver, "...or in treasury notes, or in notes of the banks of the United States, or in notes of banks payable and paid on demand in specie. ..."⁴² Neither Dallas nor Crawford who succeeded him was able to induce the state banks to resume specie payment.⁴³ Finally, on February 1, 1817, the state banks agreed to resume specie payment on February 20. This cooperation was not obtained without a price. The inducements which the national Bank offered the local banks were given at the price of much of the Bank's efficiency.⁴⁴

The Bank found itself incapable of halting the surge of speculation and dishonest financing which followed the end of the War of 1812. Hezekiah Niles observed the feverish efforts of the local bankers to ensnare and swindle the people. His soul was sickened when he, "...saw the government of the United States humbling itself to the managers of a bundle of old rags and

41 Hezekiah Niles, Editor, Niles Weekly Register, The Franklin Press, Baltimore, 18, XI, 16.

42 Annals of Congress, 14th Congress, 1st Session, I, 1440.

43 Catterall, 23-24

44 Ibid.

soliciting loans at the hands of them who had...been open bankrupts for granting such loans."⁴⁵ Niles holds that many of the banks were hardly more than "paper money manufactories and, "...designed from the beginning for a fraudulent war against the property of laboring men..."⁴⁶ It is not difficult to sense the havoc wrought by the banks when it is known that they were "as plentiful as blackberries."⁴⁷ A favorite practice of those local banks was to induce farmers, merchants, and laborers who owned property to mortgage their holdings or sell them in exchange for bank papers which were often without value. As a result of this practice many farms, lots, businesses, and homes of honest working people were lost.⁴⁸ The situation became so bad that the New York legislature, which had issued charters so freely and unwisely,⁴⁹ was forced to conduct an investigation of banking practices in New York. The committee appointed to conduct the investigation reported that the local banks were preventing the transfer of money. Local banks would do a thriving business in the area where they were located, while in distant places their notes had depreciated almost into nothingness.⁵⁰ The committee charged that unscrupulous bankers had imposed on an honest and industrious people, "...by their...flattery and misrepresentation, obtaining from them borrowed notes and endorsements, until the ruin is ...consummated, and their farms are sold by the

45 Niles, XV, 3.

46 Ibid.

47 Ibid.

48 Ibid., XIV, 2-3.

49 Beveridge, IV, 184.

50 Albert Bushnell Hart, Editor, American History as told by Contemporaries, MacMillan Co., New York, 1929, III, 441.

sheriff.⁵¹ Niles gives information which shows that the banks were not unsuccessful in their efforts to gain possession of the property of unsuspecting people who had mortgaged their holdings as security for unstable and radically depreciated bank notes. He reports that by spring of 1818 in New York alone, three-fourths of all judgements rendered by the state supreme court were against real property and in favor of local banks.⁵² In spite of these things the people clamored for more money. Jefferson after viewing the financial madness which had descended upon the country wrote that: "like a dropsied man calling for water, water, our deluded citizens are clamoring for more banks....We are now taught to believe that legerdemain tricks upon paper can produce as solid wealth as had labor in the earth..."⁵³

The lack of control over the local banks was a factor which promoted their fraudulent operations. While practically no restrictions at all were imposed by the states,⁵⁴ the regulations in the charters were ignored almost whenever the banks chose to do so.

For years the legislatures of many States were controlled by these institutions; bank charters were secured by the worst methods of legislative manipulations; Lobbyists thronged the State Capitols when the General Assemblies were in session; few if any law-making bodies of the states were without officers, directors or agents of local banks.⁵⁵

In the rapidly expanding West the desire to speculate was much stronger

51 Ibid., 441.

52 Niles, XIV, 108

53 Jefferson, Works, (Ford, Editor), XI, 494.

54 Sumner, 75.

55 Niles, XIV, 227.

than elsewhere, and the second Bank of the United States was the source of a growing hostility to the national agency.⁵⁶ The people in the Ohio valley during this period were imbued with a strong sense of localism. The national government was considered a remote and inconsequential force in the frontier life. William Faux observed that the westerners, "...speak and seem as if they were without a government and name it only as a bugbear..."⁵⁷ During this era of intense sectionalism, the people of one section were ignorant in many respects of what was going on in other sections. Local banks sprang up everywhere in the West. Niles wrote that anyone who could raise enough money to buy paper and pay the engraver could establish a bank.⁵⁸ In spite of the requirement of the law, many state banks were unable or refused to redeem their own bills by the payment of specie. In 1818 there were only six banks that could redeem their bills with specie as the law required.⁵⁹

These unfortunate conditions did not escape the attention of Chief Justice Marshall. Indeed, he witnessed at first hand many of the practices of the state banks. Sumner, in his History of the American Currency, gives the case of a man in Richmond in 1817. The man presented ten one hundred dollar notes for redemption by the Richmond bank that had issued them. The bank refused to redeem its notes, and the citizen, seeking legal redress, was unable to employ an attorney to present his case before the court. He finally secured

56 Beveridge, IV, 186.

57 Niles, XIV, 2.

58 Ibid.

59 Ibid., 108.

the judgement of a court, and the sheriff was dispatched to collect.⁶⁰ When the bank president refused to pay, the bank was closed. However, Sumner reports that the bank reopened shortly and continued the conduct of its business as before.⁶¹ Beveridge brings this case more clearly into view and describes Marshall's connection with the incident. According to Beveridge, the man who brought the action against the bank was George Fisher, Marshall's brother-in-law.⁶² He also states that the Chief Justice himself was a part of a "posse comitatus" which the sheriff called upon to assist him in serving a "distringas" upon Dr. Brockenbrough, the president of the bank.⁶³ Many other banks refused to redeem their own notes. In one such case in Pennsylvania in June, 1818, "...three justices of the peace declined to entertain suit against the bank and no notary public would protest the bills."⁶⁴

The second Bank of the United States was forced to operate under trying circumstances. Unlike the first Bank, the second Bank began under a corrupt and inefficient management.⁶⁵ Catterall states that a small clique of Baltimore and Philadelphia gamblers succeeded in gaining control of the Bank from its beginning. They sought at all times to manipulate the price of the stock on the open market. "The attempt to inflate stock values was evident in almost all the acts of the directors."⁶⁶ The corrupt and unsound management of the Bank was to precipitate a violent reaction against the institution. In the beginning the Bank did not supervise the amount and security of the

60 Sumner, 74-5.

61 Ibid., 75.

62 Beveridge, IV, 194.

63 Ibid.

64 Ibid., 195.

65 Catterall, 40.

66 Ibid., 41.

loans made by its branches. The loans made by the branches were directly influenced by heavy local demands for money.⁶⁷ Eventually the parent Bank began to force its branches to contract their loans and to demand that the local banks redeem their bills which the branches held. In response to the demands by the branches of the United States Bank, the local banks began to press their debtors for payment. The whole business resulted in a sharp increase in the number of suits brought in the courts based upon notes, bonds, and mortgages. In 1818 the courts of New Castle County, Delaware, entertained one hundred and fifty suits brought by banks alone.⁶⁸ A single bank at Harrisburg, Pennsylvania, brought more than one hundred suits in May, 1818.⁶⁹ These conditions were general and were soon followed by a shortage of currency, unemployment, and widespread privation. Most of the people and all of the state banks blamed the Bank of the United States for the confusion, corruption and suffering of the people.⁷⁰ On August 18, 1818 the Bank took drastic action to improve conditions. Catterall describes the circumstances which led to its action.

Up to July 18, 1818 the bank permitted the state banks to overtrade and to inflate the currency by the extensions of the loans of the branches. Yet had the bank managed its own offices...according to correct principles it could not have effected the principle purposes for which it was established in the Southern and Western states, because it lacked courage to insist upon the payment of debts due it from the state banks.⁷¹

67 Ibid., 32.

68 Niles, XV, 162.

69 Ibid., 59.

70 Thwaites, IX, 226.

71 Catterall, 35.

Catterall stated that the parent bank awoke in July, 1818. But, "...confusion had become so great that they were absolutely unable to check the offices."⁷² The branches finally responded to the demands of the parent Bank that they diminish their business. However, the central board of the Bank did not take decisive action against the branches or the state banks until August 28, 1818.⁷³ On that date the Bank ordered all branches to refuse the notes of all the state banks. This action set off a most violent tirade against the Bank. By requiring the state banks to redeem their bills and reducing the amount of currency in circulation, the Bank stirred the bitter feelings of local financial institutions and the people who were still contending for more money.⁷⁴ Catterall's opinion, that the Bank was incapable of effecting its chief mission of stabilizing the currency and commerce of the country, has been stated. Even the most wise administration of its affairs would not have enabled the Bank to completely stem the tides of speculation, greed, and localism. In the fall of 1818 conditions had reached the point of collapse. It marked the long delayed arrival of the bankruptcy period, and the people were not without responsibility for its coming. The Bank of the United States was held responsible for the dilemma. Niles supplies invaluable descriptions of the deplorable economic conditions in 1818. In Kentucky, houses worth \$15,000 and \$10,000 were sold for \$1300 and \$1500 respectively.⁷⁵ In John Marshall's state of Virginia conditions were equally bad. Jefferson reported that some Virginia farms could

72 Ibid.

73 Ibid.

74 Ibid., 37.

75 Niles, XVII, 85.

not be sold for a year's rent.⁷⁶ John Quincy Adams described the national conditions:

The debtor...gives up his land, and ruined and undone, seeks a home for himself and his family in the western wilderness. Staple... productions are falling to...less than half the prices which they have lately borne, the merchants are crumbling to ruin, the manufactures perishing, agriculture-stagnating, and distress universal in every part of the country. Our greatest real evil is the question between the debtor and creditor, into which the banks have plunged us deeper than would have been possible without them. The bank debtors are everywhere so numerous and powerful that they control the newspapers throughout the union, and give the discussion a turn extremely erroneous, and prostrate every principle of political economy.⁷⁷

As a result of these conditions the appeal came from the debtors to the state legislature seeking legislative protection from their creditors. The people again looked to the moneyed groups, particularly the banks, as the authors of their suffering. Rufus King wrote to Mason early in 1819 that, "The disappointment is altogether ascribed to the Bank of the United States."⁷⁸ Beveridge states the two means through which the people sought relief. The first demands were for the passage of state bankruptcy laws which would relieve the debtors from their obligations to pay their contracted debts. They wanted the judgement of courts stayed and debt payments postponed.⁷⁹ The widespread hostility to the Banks led to the general feeling that the state should rise up in its righteous sovereignty and destroy the "monster." There was a popular

76 Jefferson, (Ford, Editor), Works, XII, 145.

77 John Quincy Adams, C.F. Adams, Editor, "Memoirs of John Quincy Adams", J.B. Lippincott & Co., Philadelphia, 1874-77, IV, 375.

78 King, IV, 205.

79 Beveridge, IV, 205.

willingness to have the states tax the Banks out of existence. Beveridge expressed the feeling of many:

Let each legislature, by special taxes, strangle the branches of the National Bank operating in the states. So came a popular determination to exterminate by state action, the second Bank of the United States. National power should be brought to its knees by local authority. National agencies should be made helpless and be dispatched by state prohibition and State taxation.⁸⁰

From this intent on the part of state legislatures, during a period of widespread bankruptcy, to drive the Bank of the United States out of competition with the too numerous, uncontrolled and unprincipled state banking institutions, evolved the case of *McCulloch vs. Maryland*. The basic or underlying factors to the case were: the uncoordinated and confused condition of the national economy, the imprudent and corrupt use of capital, the popular demand for more money, the power and instability of the local banks, the serious shortage of specie following the War of 1812, the abrupt withdrawal of foreign capital following the collapse of the first Bank, the unwise administration of the affairs of the National Bank during its first two years of operation, the urgent need of the federal government for capital, and excessive sentiments of localism and sectionalism throughout the nation. This complex of contributing factors formed the general background to *McCulloch vs. Maryland*.

The immediate circumstances in the case stem from the passage of a law by the legislature of the State of Maryland, which levied a tax on the branch

⁸⁰ Ibid., 206-207.

of the national Bank at Baltimore. The law that was enacted on February 11, 1818 was only typical of many discriminating laws passed by the states and aimed at the destruction of the United States Bank and its branches.⁸¹ Kentucky, Tennessee, Ohio, Illinois and Indiana had passed laws designed for that purpose.

The Maryland law required that all banks, or branches thereof, operating in the state without charters issued by Maryland must issue their notes on special stamped paper.⁸² The paper used was to be made and sold by the state. In lieu of the use of the special paper, the United States Bank was permitted to pay a fine of \$15,000 annually. "Violators were subject to penalties for which any informer could sue."⁸³ The Baltimore branch of the Bank continued to issue its notes on unstamped paper. It also refused to pay the tax. On May 8, 1818, pursuant to the provisions of the Maryland statute, John James, "Treasure of the Western Shore," sued James McCulloch, cashier of the Baltimore branch for the recovery of such penalties as the Maryland law provided. The case was first heard in a Maryland county court from which it was appealed to the Maryland Court of Appeals. In both courts judgement was rendered in favor of the state. The case was appealed to the Supreme Court on a writ of error from the Maryland Court of Appeals, both parties having agreed on the above statement of facts.⁸⁴

The immediate question to be resolved was the constitutionality of the

81 Doskow, 58-59.

82 Thayer, II, 272.

83 Doskow, 59.

84 Ibid.

Maryland law. In deciding this question Marshall took advantage of an opportunity to, "...place the...doctrine of nationalism on the high plane of judicial decision."⁸⁵ Principles laid down in the decision have become important contributions to American constitutional development. They uphold the supremacy of the central government as opposed to the dominating sovereignty of the states. In this case of *McCulloch vs. Maryland* the very existence of the Constitution as a symbol and agency of nationality was at issue.

The argument of the case before the Supreme Court brought forth the greatest array of legal talent that had ever appeared before that tribunal in one case.⁸⁶ Three experienced lawyers argued the case for the Bank. One was William Pinkney, a member of the Maryland bar and a lawyer of great talent and accomplishment. Marshall considered Pinkney as, "...the greatest man he had ever seen in a Court of Justice."⁸⁷ With Pinkney was the great Daniel Webster, whose efforts in the *College* case had indicated his capabilities. The third man in this brilliant ~~trinity~~ ^{trivir}ate was William Wirt, whose unpreparedness in the *College* case had prevented an impressive display of his talents. The spokesmen for the state of Maryland were not lacking in brilliance, learning or accomplishments. One of them was the seventy-five year old attorney general for the state of Maryland, Luther Martin. Martin was aged but able. One of Martin's colleagues was the learned and highly respected Joseph Hopkinson

85 Corwin, Marshall and the Constitution, 128

86 Ibid.

87 Samuel Tyler, Memoirs of Roger B. Taney, James Murphy & Co., Baltimore 1872, 141.

of the Philadelphia bar. The third lawyer for Maryland was Walter Jones of Washington, D.C. Beveridge wrote that Jones appears to have been something of a legal genius.⁸⁸

Daniel Webster opened the cause for the Bank. He sought first to establish the power of Congress to establish the Bank. Sargent describes the dress which Webster wore on this auspicious occasion. He was attired in the most fashionable wearing apparel, a blue cutaway coat, tight breeches, waist coat, ruffled white shirt, and a high soft collar.⁸⁹ Webster, in opening his argument for the Bank anticipated the revival of the question as to the constitutionality of the Corporation by the defendant's counsel. He felt that, "The mere discussion of such a question may most vitally affect the value of a vast amount of private property."⁹⁰ The gifted orator expressed his opinion that the discussion and action of the first Congress had settled that question, "...as far as legislative decision could settle it."⁹¹ Webster spoke of the "characteristic perspicuity and force" with which Hamilton had laid the logical and legal foundations for the establishment of the first Bank. He drove home his point stating:

The executive government had acted upon it, and the courts of law have acted upon it. Many of those who doubted or denied the existence of the power, when first attempted to be exercised, have yielded to the first

88 Beveridge, IV, 285.

89 Nathan Sargent, Public Men and Events, David King, Jr., Philadelphia, 1875, I, 172.

90 4 Wheaton, 322.

91 Ibid., 323.

decision, and acquiesced in it, as a settle question. When all branches of the government have thus been acting on the existence of this power nearly thirty years, it would seem almost too late to call it in question....⁹²

Feeling that he had sufficiently established the constitutionality of the Bank, Webster considered the question as to whether or not Maryland could tax a subsidiary of the Bank. After referring to the constitutionally established rule that laws made in pursuance to the Constitution are the supreme law of the land, state laws to the contrary notwithstanding, Webster said: "The only inquiry therefore in this case is, whether the law of Maryland imposing this tax be consistent with the free operation of the law establishing the bank, and the full enjoyment of the privileges conferred by it? If it be not, then it is void."⁹³ In denying Maryland the power to tax the Bank, Webster spoke a resounding phrase which Marshall used in his opinion.

If the States may tax the bank, to what extent shall they tax it, and where shall they stop. An unlimited power to tax involves, necessarily, a power to destroy; because there is a limit beyond which no institution ...can bear taxation. If the states may tax, they have no limit but their discretion; and the bank, therefore, must depend on the discretion of the state government for its existence.⁹⁴

At the conclusion of Webster's able argument, John Hopkinson spoke at considerable length and with great impressiveness. The effort was more commendable in view of Hopkinson's nationalist leanings.⁹⁵ His argument

92 Ibid., 323.

93 Ibid., 327.

94 Ibid., 327.

95 Beveridge, IV, 286.

turned on three questions. They were: "1. Had Congress the constitutional power to incorporate the bank of the United States? 2. Granting this...has the bank...a right to establish its branches in the several states? 3. Can the bank...be exempt from the ordinary and equal taxation of property as assessed in the States in which they are placed?"⁹⁶ Although Hopkinson's denial of the first two questions was pointed and persuasive, he seems to have relied mainly on the right of the states to tax the Bank. He put the question:

...the third and great question in this cause presents itself for consideration; that is, shall this association come there with rights of sovereignty of the State, and with privileges possessed by no other persons, corporation or property in the State? in other words, can the bank and its branches ...claim to be exempt from the ordinary and equal taxation of property, as assessed in the States in which they are placed.⁹⁷

Hopkinson proceeds to deny the right of the Bank to claim such exemptions. He bases his denial on three points. In the first place, he argues that there is nothing in the nature or character of the Bank which entitled it to exemption from state taxation. Secondly, the interest of the United States in the Bank does not qualify it for exemption. "If the whole bank, with all its property and business, belonged to the United States, it would not...be exempted from the taxation of the states."⁹⁸ To support this position he relies on the doctrine of state sovereignty, and maintains that to exempt the Bank from state taxation would constitute an unconstitutional abrogation of the sovereign

96 4 Wheaton, 330-331.

97 Ibid., 337.

98 Ibid., 341-342.

power of the states to tax.

...the jurisdiction of the state extends over all its territory, and everything within or upon it, with a few known exceptions ...the United States and the several states must be considered as sovereign and independent; and the principle is clear, that a sovereign putting his property within the territory and jurisdiction of another sovereign, and of course under his protection, submits it to the ordinary taxation of the state, and must contribute fairly to the wants of revenue.⁹⁹

Hopkinson then makes his third point in support of his contention that the state had the power to tax the Bank. He challenges the counsel for the plaintiff to disclose anything in the letter of the Constitution which denies the states the power to make levies other than such duties on imports and exports as are, "...absolutely necessary for executing its inspection laws,"¹⁰⁰ and levies on tonnage were also prohibited. These, Hopkinson asserts, constitute the only constitutional prohibition or restraints on the taxing power of the state. How then can it be validly denied that the state of Maryland stands stripped of a sovereign power, especially when constitutional grounds for such a denial are conspicuous by their absence?

The arguments of Martin and Walter Jones were able. Jones' argument was careful and effective but he did not offer a unique approach on behalf of Maryland. Most of his argument had been touched by Hopkinson. Luther Martin strove to convince the Court of the unconstitutionality of the Bank's charter. He recalled the suspicions of such a development by the opponents to the

⁹⁹ Ibid., 342.

¹⁰⁰ Article I, Section 10, United States Constitution.

Constitution, among which he had been numbered. Martin said that:

We...insist that the authority of establishing corporations is one of the great sovereign powers of governments. The power of establishing corporations has been constantly exercised by the State government and no portion of it has been ceded by them to the government of the United States. The power establishing corporations is not delegated to the United States, nor prohibited to the individual states or to the people. It is therefore, reserved to the States, or to the people. It is not expressly delegated, either as an end or as a means of national government. It is not to be taken by implication, as a means of executing any or all of the powers expressly granted; because other means, not more important or more sovereign in their character, are expressly enumerated.¹⁰¹

The two remaining lawyers to speak were William Wirt, United States' Attorney-General and William Pinkney, truly a giant at the American bar. Both men spoke for the Bank. Wirt's effort was able and much more impressive than in the College case. However, it remained for Pinkney to capture the Court with his powerful logic and persuasive eloquence. He spoke for three days. Since in many respects Marshall's decision is a remarkable condensation of Pinkney's argument,¹⁰² no detailed consideration of Pinkney's speech will be undertaken. Pinkney, as has been noted, was considered by Marshall as the most powerful advocate at the American bar. One of the most direct and undoubtedly qualified appraisals of his effort in this case was furnished by none other than the learned Justice Story. Story said of Pinkney's great argument in *McCulloch vs. Maryland* that:

101 4 Wheaton, 374.

102 Beveridge, IV, 287.

I never in my whole life heard a greater speech; it was worth a journey from Salem to hear it; his elocution was excessively vehement, but his eloquence was overwhelming. His language, his style, his figures, his arguments were most brilliant and sparkling. He spoke like a great statesman and a patriot, and a sound constitutional lawyer. All the cobwebs of sophistry and metaphysics about state rights and State sovereignty, he brushed away with a mighty besom.¹⁰³

Pinkney concluded the arguments by the most brilliant "constellation of lawyers" that ever appeared before the Court in a single case. The arguments lasted nine days, and each lawyer seemed to have excelled all his previous efforts at the bar.¹⁰⁴ The opinion of the Court was most keenly anticipated.

On March 6, 1816, Chief Justice Marshall read what William Lewis considered as, "...perhaps the most celebrated judicial utterance in the annals of the English speaking world."¹⁰⁵ One cannot help but respond to the dramatic and majestic summary statements with which Marshall opens the opinions. With clear, sweeping and moving strokes he describes the momentous question to be decided.

In the case now to be determined, the defendant, a sovereign state, denies the obligation of a law enacted by the legislature of the union, and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that State. The Constitution of our country, in its most vital parts, is to be considered; the conflicting powers of the government of the Union and its members, as marked in that constitution, are to be discussed; and an opinion given, which may essentially influence the operations of government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision.¹⁰⁶

103 Joseph Story, William W. Story, Editor, Life and Letters, C.C. Little and J. Brown, Boston, 1851, I, 324-325.

104 Beveridge, IV, 287-288.

105 Lewis, II, 363.

106 4 Wheaton, 400.

Like all the lawyers who had argued the case, the Chief Justice first considers the constitutionality of Congress's power to establish the Bank. Denying that the question was open, Marshall recalled the acquiescence of the legislative and judicial departments after 1791. He did not rest the constitutionality of the power solely on public and governmental conformance to its exercise. Marshall expressed cognizance of the fact that some usurpations might well be resisted after more than the twenty seven years which had elapsed since the incorporation of the first Bank.

But it is conceived that a doubtful question, one on which human reason may pause, and the human judgement be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people are to be adjusted, if not put at rest by the practice of government.¹⁰⁷

After reviewing the incorporation of the first Bank and observing the cooperative conduct of the branches of the government and the reincorporation of the second Bank, the Chief Justice said: "It would require no ordinary share of intrepidity to assert that a measure adopted under these circumstances was a bold and plain usurpation to which the constitution gave no countenance."¹⁰⁸

In order to refute the argument of those who maintain that the states in their sovereign power authored the Constitution and bestowed such powers on the general government as they saw fit, Marshall considered the question of the ultimate source of power and sovereignty in the American political system. He denied the proposition that the states in their sovereignty were supreme, and

107 Ibid., 401.

108 Ibid., 402.

were therefore entitled to the dominance of their laws and institutions where there was a conflict with the laws or agencies of the general government. The view of many that the states not the people established the government of the United States was noted and denied by Marshall. He maintained that the state conventions, which were the proper and sole means of implementing the will of the people, instituted the general government.

The government proceeds directly from the people; is ordained and established in the name of the people'. ...the assent of the States, in their sovereign capacity is implied in calling a Convention, and their submitting that instrument to the people. But the people were at perfect liberty to accept or reject; and their act was final. It required not their affirmance and could not be negatived by the State governments. The constitution, which they adopted was of complete obligation, and bound the State sovereignties. The government of the union, then, ...is, emphatically and truly a government of the people. In form and substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them.¹⁰⁹

To this point the Chief Justice had upheld the power of Congress to create the Bank and denied the supremacy of state interests, institutions and sovereignty to those of the union. It was obvious, however, that a blanket declaration of national supremacy in all things would not be sanctioned by the Constitution or tolerated by the people. In view of this Marshall considered the limited character of the government of the United States. Surely there could be no dissent to the proposition that the government of United States is supreme within its sphere of authority. "It is the government of all; its

109 Ibid., 403, 404, 405.

powers are delegated by all. The nation; on those subjects on which it can act, must necessarily bind its component parts."¹¹⁰ After a clear and convincing use of reason and logic to establish his point, Marshall drew support from the Constitution. He cited Article VI which states that the Constitution and the national laws made pursuant to it were the supreme laws of the land.

Even if one admitted that the government of the United States is supreme in the specific powers granted to it in the Constitution, it still might be reasonably contended that the Constitution conferred no power on the national government to form corporations. Marshall, in resolving this question sought first to establish the fact that in addition to the enumerated powers which it enjoyed, the Congress was authorized to employ such incidental powers or means as it considered convenient or essential to the execution of its delegated powers. Admitting that under the Articles of Confederation the general government was prohibited from the exercise of anything except an expressly granted power, the Constitution, Marshall declared, contained no such prohibitions or limitation on the general government. He recollected the embarrassments the government under the Articles suffered as a result of limitations on its use of incidental or implied powers. If the framers of the Constitution had undertook to describe in accurate detail all the subdivisions of the great powers of the national government, the Constitution would have been humanly incomprehensible. Did the framers delegate to the central government such momentous powers of waging war, collecting revenue, and regulating commerce, and at the same time withhold the choice of such means as would best effect their objects?

¹¹⁰ Ibid., 405.

Marshall answered no. The government clothed with such powers would suffer from a lack of means with which to implement them. The Chief Justice then sets forth his doctrine of "implied power". Those who objected to the exercise of any implied powers are particularly firm in the denial that Congress has the right to employ such a means or incidental power as the formation of a corporation entails. The counsel for Maryland had objected to the incorporation of the Bank on the ground that the creation of a corporation is an act of sovereignty which belonged to the states and was not conferred upon the national government. To that question Marshall answers:

The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war....a great substantive or independent power, which cannot be implied as incidental to other powers or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which objects are accomplished. No sufficient reason is, therefore, perceived, why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them.¹¹¹

After establishing the creation of a corporation as an act appertaining to sovereignty and not a substantive exercise of sovereign power, Marshall quoted Article I, Section 8 of the Constitution, which empowered Congress to pass, "...all laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other Powers vested by this Constitution, in the Government of the United States or in any Department or Office thereof."¹¹² The counsel for Maryland had contended that this clause was a

¹¹¹ Ibid., 411.

¹¹² Article I, Section 8, Constitution of the United States.

restriction on the federal government's exercise of its delegated powers. They maintained that only such incidental powers as were indispensable to the exercise of the main powers were permitted by the "necessary and proper clause." The Chief Justice denied this construction of the clause. He could not agree that the word necessary controlled the clause, and restricted Congress to the exercise of only those means that are absolutely essential. The Chief Justice in destroying this ill-founded reliance on the word necessary considers the varied interpretations which might be given the use of the term.

...no word conveys to the mind, in all situations, one single definite idea....Many words which import something excessive, should be understood in a more mitigated sense-that sense which common usage justifies. The word necessary is of this description. A thing may be necessary, very necessary or absolutely or indispensably necessary.¹¹³

To illustrate this, Marshall refers to Article I, Section 10 of the Constitution, in which the framers restricted the duties or imposts which states might levy on imports and exports to such duties as were "absolutely necessary" to the execution of the states' inspection laws. Here Marshall gave his classic statement of the breath and depth of the implied powers of the national government.

Let the end be legitimate, let it be within the scope of the Constitution, and all the means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.¹¹⁴

The next question which logically arises involves the constitutionality of

113 4 Wheaton, 414.

114 Ibid., 421.

Maryland's law which taxes the Bank. In attacking the validity of the Maryland statute, Marshall states an essential and fundamental principle of the American system. It is that the Constitution and laws made pursuant to it are the supreme law of the land, and cannot be controlled by the acts of the subordinate states. From this fundamental principle, he deduced several corollaries.

These are, 1st. that a power to create implies a power to preserve. 2nd. that a power to destroy, if wielded by a different hand, is hostile to and incompatible with these powers to create and to preserve. 3rd. that where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme.¹¹⁵

The Chief Justice had established the first proposition in the early part of his opinion. He now sought to establish the incompatibility of the national power to create and preserve with the state power to tax the objects created by the general government. Holding the power to tax as a possible means of destruction, Marshall takes cognizance of the right claimed by the Maryland counsel that a state may constitutionally exercise its reserved powers against a law of the union. He met this argument saying:

All subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles exempt from taxation. The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its own permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. These powers are not given by the people of a single state. They are given by the people of the United States to a

115 Ibid., 426.

government whose laws made in pursuance of the Constitution, are declared to be supreme. Consequently; the people of a single state cannot confer a sovereignty which will extend over them.¹¹⁶

Here Marshall has stated what he considered to be a most reliable rule or principle for measuring the extent of the states' taxing power. He added to the strength of the rule when he said that:

...the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is plain repugnance in conferring on one government a power to control the constitutional measures of another, which other; with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied."¹¹⁷

Nothing remained but his conclusion. Marshall stated the unanimous opinion of the Court, that the Maryland law which taxed the Bank of the United States at Baltimore was unconstitutional and void.¹¹⁸ The Chief Justice then hastened to add that:

This does not deprive the states of any reserves which they originally possessed. It does not extend to a tax paid by the real property of the bank in common with other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State. But this is a tax on the operations of the bank, and is, consequently a tax on the operation of an instrument employed by the government of the Union to carry on its power into execution. Such a tax must be unconstitutional.¹¹⁹

116 Ibid., 429.

117 Ibid., 431.

118 Ibid., 436.

119 Ibid., 437.

CHAPTER VI

SUMMARY

The body of this paper may be logically divided into three parts. In the first section an effort was made to trace the influences in Marshall's life which lay at the foundation of his nationalist convictions. In the second part of the project the writer sought to describe the social, economic and political conditions extant in the country when Marshall began his work as Chief Justice. The reflections of Marshall's nationalist principles in three of his great opinions in constitutional law may be considered the theme of the third division.

As a boy Marshall grew up in a country that was only a colonial outpost of a great mercantile nation. He fought valiantly in the war that won his country's independence. He served as an able legislator in the key state of Virginia during the "critical period" before the American people were able to organize their government. The problems and vicissitudes which the nation experienced and Marshall witnessed from 1783 to 1787 decided Marshall that the country could hardly exist without a government for the whole. National and local experiences during those crucial years led Marshall to express his feeling that such a government of the whole would be incapable of survival, "...unless invested with large portions of the sovereignty which belongs to independent States."¹ Under the influence of the experiences of this "critical period", the American people adopted what was then the first and is now the

1 Henry S. Commager, "Our American Heritage," Scholastic, 1941, XXXIX, 11.

oldest written constitution of any nation.²

The most important period of Marshall's long career of public service began in 1801 with his appointment as Chief Justice of the United States. As Chief Justice, Marshall was in a position to vitally influence the construction and operation of the Constitution and, consequently, the fate of the general government and the entire nation. The American Constitution provided a unique system of government. The dual character of the system was at once a source of its potential strength and weakness. The framers had instituted federal and state governments possessing concurrent powers within certain spheres of authority. Marshall was to preside over the Court which was to settle disputes between the whole and its components, while preserving the specific powers, rights and privileges given to each. The task was no easy one.

There were men like Jefferson and Madison who, in their zeal for the rights of the individual, labored for the preservation of state sovereignty. They regarded the great powers of the national government as potentially destructive of individual liberty and the inviolate sovereignty of the states. Their fears were not unreasonable. Men of Madison's and Jefferson's intelligence were quite competent to judge the merit of political theories. They were learned students of government, and were not unacquainted with the organization, operation and fate of the great centralized governments and world empires, both of modern times and antiquity. The opponents to the supremacy and extension of the powers of the central government were serious in their determination to

2 Ibid.

restrict the powers of the national government in the interest of democracy.

The men who believed that the ultimate realization of the general welfare was to be secured only under a strong central government found their earliest leaders and spokesmen in Washington and Hamilton. Hamilton believed in such a loose interpretation of the Constitution as would render it capable of meeting the exigencies of the nation. Jefferson and Madison, for the greater parts of their public careers, led the ranks of the strict constructionists. The issue evolved into a question of state rights against nationalism or the supremacy and extension of national powers. This was the dominant and pervading problem of all national existence for three quarters of a century. The resolution of the problem in 1865 represented a triumph for nationalism. The main point of this effort has been to show the influence of John Marshall on the victory which established the unquestioned supremacy of national over state authority. To evaluate Marshall's contribution to the ultimate consolidation of the union is to measure his historical worth. A knowledge of his work is essential to a full comprehension of the growth and development of the United States.

Marshall took his seat as Chief Justice in 1801 and reigned there, "undisputed monarch," until his death in 1835. During his thirty-four years on the bench, the reports of the Court filled thirty volumes and contained 1215 cases.³ In 94 of these cases no opinion was filed; fifteen were "decided by the Court". Chief Justice Marshall delivered the opinion of the Court in 519 of the remaining 1106 cases. Among the total number of cases considered

3 J. B. Moore, "John Marshall", Political Science Quarterly, 1901, XVI, 403.

by the Court were 195 in international law. Marshall wrote the opinion of the Court in eighty of these cases: Justice Story followed with thirty seven.⁴ Marshall dissented in five of these opinions. The field in which Marshall gave his greatest contribution to American legal and historical development was in that of constitutional law. During his term on the bench, the Court gave sixty-two opinions in that field; and Marshall wrote the opinion of the Court in thirty six cases.⁵ The balance was divided between eleven Associate Justices. Marshall dissented in eight of these cases.⁶ It would not be accurate to credit Marshall with responsibility for so much of the Court's work if it were not for the, "...almost uncontested ascendancy which he exercised in matters of Constitutional law over the members of the tribunal in which he presided...."⁷

Across the thirty four year period, Marshall handed down many opinions which embraced principles of transcending importance. In the case of Marbury vs. Madison⁸ he invested the Court with the power to decide on the constitutionality of the acts of Congress. He defined the law of treason in Ex Parte Bollman and Swarthout,⁹ and in the case of the United States vs. Aaron Burr.¹⁰ In the case of Sturges vs. Crowningshield¹¹ the Chief Justice confirmed the rights of states to pass insolvency laws when the federal government failed to

4 Ibid.

5 Ibid., 403.

6 Ibid.

7 Ibid., 393. Commager wrote that, "...no other jurist has ever so dominated the bench as did Marshall; none ever so impressed his personality." Ibid., 11

8 1 Cranch, 137.

9 4 Cranch, 75.

10 2 Burr Trial, 401.

11 4 Wheaton, 122.

exercise its right to enact legislation on the subject of bankruptcies. In the cases of *Fletcher vs. Peck*¹² and *Dartmouth College vs. Woodward*,¹³ Marshall nullified state laws impairing contracts. In the *United States vs. Peters*¹⁴ and *Cohen vs. Virginia*¹⁵, he upheld the binding authority of the judgements of federal courts as to the constitutionality of state laws. In the *United States vs. Fisher*¹⁶ he confirmed the power of the Congress to make all laws necessary and proper to the execution of its delegated powers. A most important opinion was laid down in the case of *Gibbons vs. Ogden*¹⁷. In a compact and forceful opinion Marshall assured federal judicial protection for congressional exercise of its constitutionally granted power to regulate interstate commerce. The importance of this case has been stated by many writers. The substance of the facts may be stated briefly. In 1798 Robert R. Livingston obtained an exclusive twenty-year grant from the New York legislature to navigate by steam the rivers and waters in the state.¹⁸ The only condition in the grant was that within four years Livingston should build a steamboat, which would make four miles an hour against the current of the Hudson River. Livingston and his partner, Robert Fulton, failed, but the grant was renewed in 1803. In August Fulton's boat succeeded in navigating the Hudson under its own power from New York to Albany. New York then extended the exclusive rights of navigation to the Livingston-Fulton monopoly. Steamship navigation grew

13 4 Wheaton, 264.

14 5 Cranch, 136.

15 6 Wheaton, 264.

16 2 Cranch, 358.

17 12 Wheaton, 419.

18 Cushman, Decisions, 203.

and other states suffered because of the rights enjoyed by Livingston and Fulton. The adjoining states passed laws in retaliation for this monopoly which the New York legislature had granted.¹⁹ Ogden was authorized by Fulton and Livingston to navigate the waters covered in their grant. Gibbons, who operated steamboats between New York and New Jersey, possessed a coasting license from the United States government. Ogden petitioned a New York court for protection from what he considered to be unfair competition. Chancellor James Kent wrote the opinion of the New York court which enjoined Gibbons from operating. Gibbons then appealed to the United States Supreme Court on the basis of the commerce clause.

Marshall wrote an opinion in this case which many consider his most powerful state paper. Others rank it second only to *McCulloch vs. Maryland*.²⁰ Ogden's counsel sought to restrict the meaning of the word commerce to traffic, buying and selling. Marshall accepted this but maintained that:

Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The Convention must have used the word in that sense;²¹ and the attempt to restrict it comes too late....

Maintaining that steamboats could be licensed and enrolled as were sailing vessels using sails, Marshall held that no restraint could be imposed on steamboats as to their privilege to navigate in inland waters.

Preliminary to his consideration of the immediate question in the decision,

19 Ibid.

20 Ibid., 204.

21 Ibid., 206-207.

Marshall stated the essential change in the status of the states which had followed the adoption of the Constitution. The counsel for the appellee had argued that the sovereignty of states would be endangered by any change or reversal of the New York decision. Marshall replied that:

...when these allied sovereigns [states under the Confederation] converted their league into a government, when they converted their Congress of ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a legislature, empowered to enact laws on the most interesting subjects, the whole character in which the states appear underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected.²²

Obviously, Marshall was preparing the way for the nullification of the New York statute. In reversing the judgment of the New York court, he acted to free, "...a developing commerce from the shackles of state monopoly...."²³

The opinion permanently fixed the supremacy of the central government's control over all factors relating to interstate and foreign trade. The Chief Justice, in thus overruling the ablest judges of New York State, cast out a previously unquestioned state right and made possible a further extension of state power. Today the nation progresses under the stabilizing and unifying influence of federal regulation of interstate commerce. Harry A. Tarr wrote that:

Without this decision the states might have remained isolated continually blocking each other's trade, and transportation would have remained a monopoly of a few powerful men. Marshall's decision freed American commerce, and commerce helped unite all the states of the Union.²⁴

22 Ibid., 205.

23 Ibid., 205.

24 Harry A. Tarr, "John Marshall, 'Second Maker of the Constitution'", Scholastic, 1940, XXXVII, 15.

The opinion in the case of *McCulloch vs. Maryland*²⁵ contained Marshall's classic statement of the doctrine of implied powers and set down a rule governing the levy of state taxation on federal and governmental agencies. The statement by Marshall marked the first formal judicial statement of the loose constructionist doctrine, and considerably broadened the sphere of federal legislation. In the opinion Marshall gave the Bank constitutional sanction. In spite of Jackson's destruction of the Bank's superstructure, upon the foundation Marshall had laid in an opinion which combined the foresight of the statesman with the matchless reasoning of the lawyer, arose the National Bank system which stands today unshaken, improved and secure. His opinions reflect the object and character of Marshall's work. Through the acquisition of Louisiana, war with England, turbulent relations with France, embargoes, Missouri compromises, tariff struggles and nullification, he maintained his course and pursued his object of upholding the Constitution and cementing the nation.²⁶

Chief Justice John Marshall was one of that group of five, Washington, Jefferson, Madison, Marshall and Hamilton who, perhaps, more than any other men, gave shape, direction, and permanent form to American political institutions. Marshall's great work seemed to fall into two general categories. One accomplishment seems to be his successful application of the written American Constitution to the needs and exigencies of the nation. In order to succeed in this endeavor, it was necessary to breathe life into the document and to construe it in such a manner as to utilize its prodigious latent powers. Some

25 4 Wheaton, 316.

26 J.A. Krout, "Chief Justice Marshall", Outlook, 1901, LXVII, 328.

note has been taken of the small amount of construction which the Supreme Court had given the Constitution when Marshall assumed the Chief Justiceship. Only six cases founded on constitutional questions had been entertained during the Constitution's eleven year existence. It is not strange that the possibilities and shortcomings of the Constitution were not known. When Marshall ascended the bench, much of the meaning of the Constitution was obscured. Working within the narrow confines of judicial prerogatives, he set himself to the task of rendering a short, uncontrued, written Constitution competent to its great objectives. More than once he paused in his decisions to remind his listeners that it was a written constitution under exposition. It was Marshall's awareness of the object, nature and operation of the written Constitution and his successful striving to apply it to urgent national problems that describes his first task. Henry Cabot Lodge effectively describes Marshall's work in this connection. He wrote that Marshall,

So far as a court could do, made the Constitution march. He showed that it could take on the flexibility of an unwritten constitution; that it could be developed and made to meet new conditions, while it retained the fixity of principle and certainty of operation the lack of which is the everpresent danger of a constitution which exists only in tradition, habits, two or three great charters and the decision of the courts.²⁷

The second phase of Marshall's work is his greatest and most vital contribution to American political and economic development. In this work, Marshall defended the Constitution and the central government, "...dominant over the states and the means of creating a nation, of stimulating the national sentiment and nourishing the national life. That he succeeded in that single

27 Henry Cabot Lodge "John Marshall, Statesman," North American Review, 1901
LXXII. 193.

work is, in itself, the highest praise and most ample evidence of his intellectual power and his force of character."²⁸ It is the yardstick of his historical and legal merit.

It was through his decisions in the field of constitutional law that Marshall accomplished this work. The constitutional historian, Frances Thorpe is quoted as saying that: "'Marshall...established the principles of our national system of government and laid the foundation of American constitutional law....It is not too much to say that the fate of the national government hung in the balance in the cases which he decided.'"²⁹ His work in binding together the business and political interests of the nation is all the more impressive, when it is remembered that in 1800 there was little or no predilection toward government of any kind among the three and a quarter million Americans, in any section of the country. In spite of their objection to government, Marshall not only called men, corporations, and institutions before the Court, but he had them to understand that a high tribunal existed before which states could be made to plead, and by which the acts of state legislatures could be invalidated. He pointed out and developed principles through which Presidents and Congresses, either Federalist or Republican, were enabled to assert the powers of their offices. So positive and extended was his influence on the Constitution that Edmund Guillon wrote that, "...the Constitution is the fullbodied sublimated shadow of John Marshall."³⁰ Justice Bradley stated that:

28 Ibid.

29 "John Marshall and the Constitution", The Literary Digest, 1926, LXXXVII, 36.

30 Charles H. Gaines, "John Marshall and the Spirit of America", North American Review, 1917, LLVI, 287.

"The Constitution...received its permanent and final form from judgments rendered by the Supreme Court during the period in which Marshall was at its head."³¹ Burton Hendrick, who felt that Holmes and Marshall were by far the greatest geniuses to ever sit on the bench, reported the high esteem in which Holmes held Marshall.³²

Chief Justice John Marshall took the instrument which began as a product of many compromises between conflicting states, and, following the course charted by Washington and Hamilton, converted it into a flexible yet well founded charter of American nationality. He was blessed with long life. At his death in 1835, he had successfully completed the task of unifying the nation so far as it was possible to do by judicial decree. It remained for the succeeding generation to subject his principles to the dreadful test of war. Fortunately for the nation and, perhaps, for all mankind as well, Marshall's work came forth from that bloody ordeal, battered, triumphant and secure. That victory stamped John Marshall as a member of that small group of men who have employed their genius, courage and high station in the affairs of men to found states and build nations. Oliver Wendell Holmes rightly said that: "the thing for which Hamilton argued...and Marshall decided, and Grant fought and Lincoln died is now our corner stone."³³

31 Edmund Guillon, "John Marshall and Federal Supremacy", The Pan-American Magazine, 1930, XXXIII, 421.

32 Burton J. Hendrick, Bulwark of the Republic, Little, Brown and Co., Boston, 1938, 427.

33 Ibid., 426.

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APPROVAL SHEET

The thesis submitted by Earl McKinley Lewis has been read and approved by three members of the Department of History.

The final copies have been examined by the director of the thesis and the signature which appears below verifies the fact that any necessary changes have been incorporated, and that the thesis is now given final approval with reference to content, form, and mechanical accuracy.

The thesis is therefore accepted in partial fulfillment of the requirements for the Degree of Master of Arts.

June 23rd 1948
Date

John A. Zetina
Signature of Adviser